Recent Developments in the Law of Lawyering 2003-2004

Presented by

State Bar of California
Committee on Professional Responsibility and Conduct

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American Academy of Pain Management v. Joseph (9th Cir. 1/2/2004) 353 F.3d 1099, 2004 WL 19824.

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Non-profit organization that certifies doctors lost its suit alleging that statute, Cal. Bus. & Prof. Code § Section 651(h)(5)(B), and regulations promulgated pursuant to the statute that prohibited doctors from advertising they are "board certified" unless the certification meets certain requirements, were unconstitutional. Compare Cal. Rule of Prof. Conduct 1-400(D)(6), concerning lawyers advertising they are "certified specialists".

People v. Bautista (6th Dist. 1/27/2004), mod. (2/17/2004) 115 Cal.App.4th 229, 8 Cal.Rptr.3d 862, rev. denied (4/14/2004).

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Court held that lawyer's failure to advise his client, a long-time permanent resident of the United States, that an upward plea to a "non-aggravated" felony would result in a longer prison term but not in deportation upon the client's release from prison, amounted to ineffective assistance of counsel where the plea to the "aggravated felony" for immigration purposes resulted in less prison time but an order for client's deportation upon his release from prison.

Best Products, Inc. v. Superior Court (Granatelli Motorsports, Inc.) (2d Dist. 6/28/2004) 119 Cal.App.4th 1181, 15 Cal.Rptr.3d 154.

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Court of Appeal reverses trial court in holding that a litigant's response to interrogatories by a boilerplate assertion of the attorney-client privilege and work-product immunity does not result in waiver of either. The court of appeal noted that providing a privilege log at that early stage of the proceedings was not required where the proponent is only asking the respondent to identify documents.

BGJ Assoc., LLC v. Wilson (2d Dist. 12/3/2003) 113 Cal.App.4th 1217, 7 Cal.Rptr.3d 140, 3 Cal. Daily Op. Serv. 10,367, 2003 Daily Journal D.A.R. 13,066, 2003 WL 22853071.

Business Transaction With Client

Conflicts of Interest

Oral Agreements

Quoting ***Beery v. State Bar*** (1987) 43 Cal.3d 802, 813, 739 P.2d 1289, 239 Cal.Rptr. 121, the court held that when a lawyer enters into a business transaction with a client, "he must make it manifest that he gave to his client all that reasonable advice against himself that he would have given him against a third person," and that as a result there is a presumption of undue influence. The court concluded that an oral joint venture which the lawyer had entered into with his client and a third person was unenforceable as it violated California Rule of Professional Conduct 3-300, which requires that the terms of a business transaction with a client are fair and reasonable to the client, are disclosed in writing to the client, and the client gives written consent to the arrangement after being given a reasonable opportunity to consult independent counsel.

Biehl v. Comm'r Int. Rev. (9th Cir. 12/12/2003) 351 F.3d 982, 2003 WL 22928876.
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Attorneys fees from settlement of a wrongful termination action that are paid directly to a tax payer's lawyer are not an adjustment to gross income stemming from a reimbursed employee expense under Internal Revenue Code § 62(a)(2)(A) and must be treated as an itemized deduction. The court reasoned that the attorney fees expense had arisen after termination of the employment relationship and thus had arisen from, but not "in connection with" employment. *See* ***Jalali v. Root*** (2003) 109 Cal.App.4th 624, 135 Cal.Rptr.2d 168, *as modif. on rehrg.*, 109 Cal.App.4th 1768, 1 Cal.Rptr.3d 689 (7/8/2003), *rev. denied* (9/24/2003) (holding that lawyer's failure to adequately explain the tax consequences of a personal injury judgment was not malpractice).

Borissoff v. Taylor & Faust (7/15/2004) 33 Cal.4th 523, 93 P.3d 337, 15 Cal.Rptr.3d 735, 4 Cal. Daily Op. Serv. 6307, 2004 Daily Journal D.A.R. 8584, 2004 WL 1574704.
Malpractice
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The Supreme Court held that the executor of an estate had standing to file a malpractice suit against the tax lawyer who had been retained by the executor's predecessor. The Supreme Court reasoned that "the successor fiduciary must have standing to sue the predecessor's attorney if there is to be an effective remedy for legal malpractice that harms estates and trusts administered by successor fiduciaries." 15 Cal.Rptr.3d at 739. The court relied on Probate Code §§ 8524(c) ("successor personal representative has the powers and duties in respect to the continued administration that the former personal representative would have had"), 9820(a) (powers of the representative include the authority to "c]ommence and maintain actions and proceedings for the benefit of the estate"), and 10801(b) (representative has the power to "employ or retain tax counsel") in reaching its result. *Id.* At 738-739.

Bracken v. Harris & Zide LLP (N.D.Cal. 1/8/2004) 219 F.R.D. 481, 2004 WL 73594.
Fair Debt Collection Practices Act
Trusts & Estates
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In action under Fair Debt Collection Practices Act ("FDCPA"), court allowed plaintiff to substitute co-trustees of attorney-defendant's living trust in place of attorney defendant, who had died while the action was pending. The court reasoned that the FDCPA was remedial rather than penal, so the cause of action survived the lawyer's death.

Brown v. Superior Court (Cyclon Corp.) (3d Dist. 3/1/2004) 116 Cal.App.4th 320, 9 Cal.Rptr.3d 912.
Attorney Lien
Jurisdiction
Court holds that attorney could not appear in the client's underlying action to assert and attempt to prove the seniority of his attorney lien against the proceeds of the judgment where a judgment creditor had filed a motion under Civ. Pro. Code § 708.470 to confirm its judgment lien. Nevertheless, although the attorney was required to prove the validity and superiority of his

attorney lien in a separate action, the Court of Appeal held that it would be an abuse of discretion for the trial court to award the proceeds of the judgment to the judgment creditor when it was aware of the potentially senior attorney lien. If the trial court determines that the attorney lien likely is superior, then it should deny the judgment creditor's application without prejudice.
Cautionary Note: Early in its opinion, the court of appeal discussed how an attorney lien may created. The court's statement appear to have been called into question by the California Supreme Court's decision in ***Fletcher v. Davis*** **(2004)** 33 Cal.4th 61, 90 P.3d 1216, 14 Cal.Rptr.3d 58, *below*.

In re Buck (C.D.Cal. 1/21/2004) 307 B.R. 157.
Bankruptcy Preparer
Handling Client Funds
Court held that 11 U.S.C. § 110(g)(1), which prohibits a bankruptcy preparer from "collect[ing] or receiv[ing] any payment" from the debtor, not only precludes a bankruptcy petition preparer from collecting court filing fees for his or her own account out of which the preparer would pay the debtor's filing fee, but also precludes the preparer from simply receiving from the debtor a check payable to the bankruptcy court, and affirmed imposition of sanctions on the preparer. See also ***In re Shoup***, below.

Cassim v. Allstate Ins. Co. (Cal. 7/29/2004) ___ Cal.4th ___, 94 P.3d 513, 16 Cal.Rptr.3d 374, 4 Cal. Daily Op. Serv. 6812, 2004 Daily Journal D.A.R. 9267.
Trial Misconduct
In bad faith insurance claim, insurer alleged that plaintiff insureds had engaged in intentional misrepresentation by presenting the insurer with reconstructed receipts of their alternative living expenses incurred after their home had burned down. The Supreme Court held that it was not misconduct for plaintiffs' lawyer to have analogized that situation during closing argument to the court in this very same action having told the jurors that they could claim a day of jury service even on the days when court was not in session. The court also noted that even if the closing argument could be argued to have been misconduct, there was no prejudice. Accordingly, the court held that the Court of Appeal should not have reversed the jury verdict in favor of insureds.

Ceballos v. Garcetti (9th Cir. 3/22/2004) 361 F.3d 1168, 2004 Daily Journal D.A.R. 3541.
First Amendment
Attorney's Free Speech Rights
Ninth Circuit held that deputy district attorney's memorandum to the effect that a deputy sheriff either lied or grossly misrepresented facts in obtaining a search warrant was speech that was a matter of public concern and his interest in expressing himself outweighed the government's interests in promoting workplace efficiency and avoiding workplace disruption. Therefore, the district court erred in granting summary judgment in the deputy district attorney's lawsuit under 42 U.S.C. § 1983 alleging retaliation for having written and circulated the memorandum. Further, because the district attorney office's actions primarily personnel rather than prosecutorial functions, the district attorney was not entitled to immunity.

Cole v. United States District Court for the District of Idaho (9th Cir. 5/4/2004) 366 F.3d 813.
Attorney-Client Relationship
Disqualification of Counsel
Jurisdiction
Court concludes that magistrate clearly erred when he disqualified plaintiffs' lead counsel who had been involved in case for six years, and revoked lawyer's *pro hac vice* status as sanction for lawyer's not having filed an affidavit in a disqualification motion as ordered by the magistrate, without first giving the lawyer notice or an opportunity to be heard. Nevertheless, the court of appeals refused to grant plaintiff's mandamus relief because plaintiff had failed first to raise the issue by appealing to the district judge.

People v. Cole (8/16/2004) ___ Cal.4th ___, ___ P.3d ___, ___ Cal.Rptr.3d ___, 2004 WL 1811426.
Criminal Law
Defendant's Choice of Counsel
Abuse of Discretion
The Supreme Court held that the trial court did not abuse its discretion by either: (1) refusing, over the objection of defendant, to allow lawyer who had been representing defendant while employed with the Alternate Public Defender's Office ("PDO") to continue to represent defendant after the lawyer had left the Alternate PDO for private; or (2) refusing, again over the objection of the defendant, to appoint the lawyer to represent defendant when the trial court had removed the Alternate PDO from representing defendant because it could not be ready for trial, where the attorney the court did appoint could be ready for the trial date the court had set, but lawyer could not firmly commit to be ready.

United States v. Councilman (1st Cir. 6/29/2004) 373 F.3d 197.
E-mail
Expectation of privacy
Confidentiality
First Circuit Court of Appeals held that the practice of employee of an internet service provider (ISP) to read e-mails that were stored on the ISP's servers while awaiting delivery did not constitute "interception" within the meaning of the Federal Wiretap Act, 18 U.S.C. § 2510(17).
Cautionary Note: The court's decision raises a question about the advisability of communicating with clients by unencrypted e-mail. In the major ethics opinion on the issue of whether a lawyer violated his or her duty of confidentiality by communicating with a client through unencrypted e-mail, the ABA held that the lawyer did not, in part because intercepting such e-mails would be a violation of the Wiretap Act and the Electronic Communications Privacy Act of 1986, which amended the Wiretap Act to include "electronic communications." See ABA Formal Ethics Opinion 99-413 (Mar. 10, 1999).

Matter of Davis (Cal.St.Bar.Ct. 8/6/2003) 4 Cal. State Bar Ct. Rptr. 576, 2003 Daily Journal D.A.R. 8942, 2003 WL 21904732.
Conflict of Interest
Misappropriation & failure to account for client's funds
Lawyer was put on suspension for two years and placed on probation for four years for engaging in a conflict of interest in violation of Cal. Rules 3-310(B) & (C), and 3-600 with his corporate client by treating as his client an individual constituent of the corporate client whom lawyer was aware had been stripped of his authority to act on behalf of the corporate client, and for distributing to the constituent $50,000 from a settlement check made out to the corporation.

In re Dayton (N.D.Cal. Bkrtcy. 2/24/2004) 306 B.R. 322.
Bankruptcy
Attorney Fees
Court held that court-awarded attorney fees against a credit card company in a bankruptcy matter would not be limited to the $200 debtor and debtor's attorney had allocated for defense of the company's non-dischargeability claim, but would be calculated as a reasonable fee based on a reasonable hourly rate multiplied by the hours the attorney devoted to the matter.

Derivi Construction & Architecture, Inc. v. Wong (3d Dist. 5/24/2004) 118 Cal.App.4th 1268, 14 Cal.Rptr.3d 329.
Conflicts of Interest
Attorney Disqualification
Family Relationships
The Court of Appeal affirmed the trial court's denial of a motion to disqualify defendant's lawyer and his law firm on the grounds that the lawyer's wife had worked for a law firm that previously had represented defendant but been disqualified. The court reasoned that imputing the previous firm's disqualification to defendant's lawyer (and then his law firm) through defendant's lawyer's wife, who had not worked on the case but had simply worked for the first law firm, "carries the concept of vicarious disqualification too far." 118 Cal.App.4th 1268, 14 Cal.Rptr.3d at 336.

State v. Doe (Ohio 3/3/2004) 101 Ohio St.3d 170, 803 N.E.2d 777.
Attorney-client Privilege
Death of Client
The Ohio Supreme Court held that a lawyer must testify to a grand jury about a deceased client and may not assert the attorney-client privilege when the deceased client's spouse has waived the attorney-client privilege.
Note: This opinion will not likely be persuasive in other jurisdictions as the court relied on an Ohio Statute, Ohio Rev. Code §2317.02, which provides: "The following persons shall not testify in certain respects: [¶.] (A) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, *except* that the attorney may testify by express consent of the client or, *if the client is deceased, by the express consent of the surviving spouse* or the executor or administrator of the estate of the deceased client. . . ." (Emphasis added).
But see also ***In re Death of Miller*** **(N.C. 2003),** ***below*****.**

Duran v. St. Luke's Hospital (1st Dist. 12/16/2003) 114 Cal.App.4th 457, 8 Cal.Rptr.3d 1.
Litigation
Statute of Limitations
Court holds that it was a jurisdictional defect to file a complaint with a $203 filing fee when the required filing fee was $206, thus requiring the trial court to dismiss the action when firm did not correct the fee discrepancy until after the statute of limitations had run. *Compare* ***Hu v. Fang*** (12/5/2002) 104 Cal.App.4th 61, 127 Cal.Rptr.2d 756; ***Pincay v. Andrews*** (9th Cir. 12/10/2003) ___ F.3d ___, 2003 WL 22902636.

Ewing v. Goldstein (2d Dist. 7/16/2004) 15 Cal.Rptr.3d 864, 2004 WL 1588240.
Patient-Psychotherapist Privilege
Duty to Warn
Court concludes that psychotherapist has duty to warn potential victim under statute, Civil Code section 43.92, which protects patient communications unless "the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims," even where the threat is communicated to the psychotherapist by a member of the patient's family for purposes of furthering the patient's treatment.
***Compare* Bus. & Prof. Code § 6068(e)(2)**, which provides that "an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." Note that § 6068(e) does not limit the source of information to being provided by the client. *See also* **Cal. Rule of Prof. Conduct 3-100**.

Farris v. Fireman's Fund Ins. Co. (5th Dist. 6/17/2004) 119 Cal.App.4th 671, 14 Cal.Rptr.3d 618.
Conflicts of Interest
Substantial Relationship
"Playbook" Theory of Disqualification
Ethical Screen
In an action alleging bad faith and breach of insurance contract, the Court of Appeal reversed the trial court's denial of defendant insurer's motion to disqualify plaintiff insureds' lawyer, who previously had represented insurer, and the lawyer's law firm. The Court of Appeal reasoned that there was a substantial relationship between the lawyer's previous representation of the insurer and the current matter in that the lawyer's relationship with the insurer had been personal and direct given that the lawyer had been the insurer's coverage lawyer for 13 years and had actively participated in the insurer's representation in coverage and bad faith cases, both of which turn on the legal issue of whether there was coverage under the policy. In reaching its decision, the court of appeal relied heavily on the reasoning of ***Jessen v. Hartford Casualty Ins. Co.*** (2003) 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877, but denied that *Jessen* applied a "playbook" approach to disqualification, 119 Cal.App.4th at 680, 14 Cal.Rptr.3d at 623. The Court of Appeal, however, did offer two qualifications to its application of the substantial relationship test to situations in which the targeted lawyer had not been involved in the particular matter for which the moving party seeks the lawyer's disqualification. First, the court noted that the "the passage of time might be shown to have eliminated a prior substantial relationship due to such events as changes in

corporate structure, turn over in management, and the like." Id. at 686, 14 Cal.Rptr.3d at 628. That was not true here, where the lawyer had left the insurer only six months before. Second, as to the vicarious disqualification of the lawyer's law firm, the court cited to ***People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*** (1999) 20 Cal.4th 1135, 1153, 86 Cal.Rptr.2d 816, 980 P.2d 371, suggesting that an ethical screen might serve to avoid the disqualification of the entire firm. 119 Cal.App.4th at 689 n.17, 14 Cal.Rptr.3d at 630.

Fletcher v. Davis (6/10/2004) 33 Cal.4th 61, 90 P.3d 1216, 14 Cal.Rptr.3d 58, 2004 WL 1276709.

Attorney Fees
Charging Lien
Rule of Professional Conduct 3-300

In reversing the Court of Appeal, the California Supreme Court held that an attorney's agreement with a client, authorizing a lien for payment of *hourly* attorney fees to be imposed against any recovery in the litigation, must not only be in writing, but also must fully comply with Cal. Rule of Prof. Conduct 3-300, which applies to any transaction under which a lawyer obtains an ownership, possessory, security or other pecuniary interest adverse to a client, and requires that the terms of any agreement by which the lawyer acquires such an interest adverse to the client be "fair and reasonable to the client," that the terms be "fully disclosed" and transmitted in writing to the client "in a manner which should reasonably have been understood by the client," that the client be advised he or she "may seek the advice of an independent counsel" and given an opportunity to so consult, and that the client give his or her informed written consent. The Supreme Court reasoned that a charging lien against recovery in litigation was a security interest and also that it was adverse to the client because it "grants the attorney considerable authority to detain all or part of the client's recovery whenever a dispute arises over the lien's existence or its scope." 33 Cal.4th at 69, 90 P.3d 1216, 14 Cal.Rptr.3d at 64. In reaching that conclusion, the court rejected a view adhered to by many legal ethicists in California that only an interest under which a lawyer could "summarily extinguish the client's interest in property" would be deemed an adverse interest. *See* ***Hawk v. California State Bar*** (1988) 45 Cal.3d 589, 754 P.2d 1096, 247 Cal.Rptr. 599, noting that the Hawk situation was but one type of adverse interest.

Cautionary Note: Although the Supreme Court expressly limited its holding to an attorney's lien to secure *hourly* fees because that was the only issue with which it was confronted, it appeared to have expressed skepticism with a Los Angeles County Bar Ethics Opinion that concluded that rule 3-300 did not apply to a *contingency* fee agreement coupled with a lien. 33 Cal.4th at 70 n.3, 90 P.3d 1216, 14 Cal.Rptr.3d at 65 n.3. It is therefore possible that even in contingency fee situations, an attorney lien agreement must comply with rule 3-300.

Frye v. Tenderloin Housing Clinic, Inc. (1st Dist. 7/27/2004) ___ Cal.App.4th ___, 16 Cal.Rptr.3d 583, 4 Cal. Daily Op. Serv. 6750, 2004 Daily Journal D.A.R. 9155, 2004 WL 1661094, *modif.*, 2004 WL 1850439 (8/18/2004).

Attorney Fees
State Bar Registration
Disgorgement of Fees
Unauthorized Practice of Law

A non-profit housing clinic whose bylaws stated its purpose "to provide housing law education

and information to low-income tenants," and to foster "the preservation and improvement of housing, particularly residential hotels, assisting tenants to assert their legal rights, using legal skills as necessary to serve the low and moderate income residents of the Tenderloin community," was held not to be qualified to practice law and thus was not entitled to collect statutory attorney fees in representing low-income tenants. In action filed by a client the clinic had successfully represented, the court reasoned that the clinic was not exempt from the statutory requirement that legal services corporations – whether for-profit or non-profit – register with the State Bar. Cal. Bus. & Prof. Code §§ 6160, 6213; Cal. Corp. Code § 13401(b). Moreover, the court concluded that even if it were registered, the clinic would not be able to enter into contingency fee agreements because its primary purpose was not "to provide legal services or legal training without charge to indigent persons." See Bus. & Prof. Code § 6213(a) & (b). Although the court concluded the clinic's client could maintain an action for money had and received and for breach of fiduciary duty, it affirmed the trial court's summary judgment against the client's claim for misrepresentation because there was no evidence the client had been harmed.

F.S.L.I.C. v. Ferrante (9th Cir. 4/6/2004) 364 F.3d 1037.
Attorney Fees
Jurisdiction
Court did not have jurisdiction to resolve attorney fee dispute over services provided in lawsuit where the settlement agreement provided that the court "shall retain jurisdiction over this Agreement," but nothing in the court retained jurisdiction in the order of dismissal, and there was no provision in the settlement agreement about attorney fees.

Furia v. Helm (Cal. App. 1st Dist. 9/11/2003) 111 Cal.App.4th 945, 4 Cal.Rptr.3d 357.
Lawyer As Mediator
Conflict of Interest
Duty to Disclose
Attorney for homeowners agreed to act as mediator to help resolve dispute between contractor and contractor's former remodeling clients, the homeowners. Although court concluded that attorney and contractor were not in an attorney-client relationship and thus rule 3-310 was "not strictly applicable" lawyer acting as a mediator nevertheless had the same duty of full disclosure to the contractor as he would have in accepting the representation of clients with actual or potentially conflicting interests. Nevertheless, in this case, because the contractor had previously successfully argued before the State License Board that he had not abandoned the remodeling project, he was estopped from asserting that his reliance on attorney's advice caused him to abandon the project.

Gadda v. Ashcroft (9th Cir. 4/1/2004) 363 F.3d 861, *as amended* (7/20/2004) 363 F.3d 861.
Immigration Law
Reciprocal Discipline
The Ninth Circuit held that the State Bar was not preempted by federal law from disbarring a California lawyer for misconduct related to the lawyer's federal immigration practice. The California Supreme Court had affirmed the findings and recommendations of the State Bar court and disbarred the lawyer, who had committed misconduct over a period of about six years, including commingling funds, mishandling client money, the failure to refund fees, and the failure to appear and the failure to communicate significant developments to clients. The Ninth Circuit

thereupon imposed reciprocal discipline and disbarred the lawyer from appearing before it, and the Board of Immigration Appeals and immigration courts. The court also concluded there was an independent basis for disciplining the lawyer in the Ninth Circuit: "Conduct unbecoming a member of the bar of the Ninth Circuit."

Garabedian v. Los Angeles Cellular Tel. Co. (4th Dist. 4/29/2004) Cal.App.4th 123, 12 Cal.Rptr.3d 737.
Attorney Fees
Class Action
Court of Appeal held that a trial court has an independent duty to review a class action attorney fee provision for reasonableness and affirmed the trial court's summary judgment dismissing plaintiff class lawyer's suit against defendants for breach of settlement agreement after the trial court had awarded lower fees than were provided for in the settlement of the underlying class action. The court noted that the parties could not by agreement take away the trial court's duty of independent review, but also held that defendants were not entitled to sanctions for a frivolous appeal because this was the first case to expressly identify trial judges' independent duty.

Glassman v. McNab (Cal.App. 2d Dist. 11/4/2003) 112 Cal.App.4th 1593, 6 Cal.Rptr.3d 293, 2003 WL 22480462, 3 Cal. Daily Op. Serv. 9601, 2003 Daily Journal D.A.R. 12,091.
Mandatory Fee Arbitration
Jurisdiction of Arbitrator
Notwithstanding ***National Union Fire Ins. Co. v. Stites Prof. Law Corp.*** **(1991) 235 Cal.App.3d 1718**, in which the court held that an arbitrator under the Mandatory Fee Arbitration Act, Bus. & Prof. Code §§ 6200 et seq., does not have jurisdiction to determine the existence of an attorney-client relationship, the statute nevertheless allows the parties to stipulate that the arbitrator may determine whether an attorney-client relationship exists.

Gold v. Weissman (2d Dist. 1/12/2004), mod. on rhg. (2/10/2004), rev. denied (3/30/2004), 114 Cal.App.4th 1195, 8 Cal.Rptr.3d 480.
Malpractice
Statute of Limitations
In this case, the lawyer had not timely filed a complaint for medical malpractice and, after attempts to settle with the client failed, assisted the client and client's daughter (an out-of-state attorney) in drafting a complaint to the Medical Board of California. That complaint was never filed and when the client filed this legal malpractice action a year less one day after the lawyer had ceased his assistance with the Medical Board matter, the lawyer moved for summary judgment, which the trial court granted. The Court of Appeal, however, held that the statute of limitations for legal malpractice is tolled for the period during which the lawyer continues to represent the client, and concluded that the Medical Board matter involved the "same specific subject matter" as late-filed medical malpractice action and came within the meaning of Cal. Civ. Pro. Code § 340.6(a)(2), thus tolling the statute.

Gray Cary Ware & Freidenrich v. Vigilant Ins. Co. (4th Dist. 1/12/04), mod. (2/4/2004) 114 Cal.App.4th 1185, 8 Cal.Rptr.3d 475.

Arbitration

Attorney Fees

Cumis Counsel

The Court of Appeal held that the Cumis statute, Cal. Civil Code § 2860(c), did not require an insurer to arbitrate disputes over expenses incurred by the insured's independent counsel in the underlying suit, reasoning that section 2860(c)'s arbitration provision applied only to suits about the amount of legal fees or the hourly billing rate of independent counsel. *Id.* at 1192, 8 Cal.Rptr.3d at 479.

Green v. Baca (C.D.Cal. 12/16/2003) 219 F.R.D. 485.

Attorney-Client Privilege

Waiver

In § 1983 action alleging unlawful detention, plaintiff sought discovery of documents relevant to plaintiff's claim that defendant has a policy of detaining persons in violation of their right to be released within a reasonable time after the reason for their detention has ended. The court held that County's assertion that it could not comply with the request because separating privileged from unprivileged documents would be too burdensome was an improper blanket privilege objection because County had made no particularized showing that any of the requested documents were privileged, and ordered that the documents be produced in response to the discovery request, which the magistrate judge had narrowed.

People v. Griffin (Cal. 7/19/2004) 33 Cal.4th 536, 93 P.3d 344, 15 Cal.Rptr.3d 743, 2004 WL 1597859.

Conflicts of Interest

Disqualification of District Attorney's Office

In a death penalty case, the California Supreme Court held that the entire district attorney's office did not have to be disqualified where the district attorney had employed an investigator who had been a defense investigator and had performed some work related to the defendants' case. The court noted there was no evidence that the investigator, who worked in a different department and a different office from the office out of which the actual prosecutors operated, had ever spoken with anyone in the DA's office about the case, a fact which defense counsel conceded. For discussions of the law concerning the recusal of a district attorney's office, see generally ***Hambarian v. Superior Court*** (2002) 27 Cal.4th 826, 833, 44 P.3d 102, 118 Cal.Rptr.2d 725; ***People v. Eubanks*** (1996) 14 Cal.4th 580, 590-594, 59 Cal.Rptr.2d 200, 927 P.2d 310; ***People v. Superior Court (Greer)*** (1977) 19 Cal.3d 255, 137 Cal.Rptr. 476, 561 P.2d 1164.

Hernandez v. Superior Court (Neal) (2d Dist. 2/23/2004), modified (2/24/2004), 115 Cal.App.4th 1242, 9 Cal.Rptr.3d 821.
Attorney Death
Trial Continuance
Trial court abused discretion in denying personal injury plaintiff a continuance of the trial date for a longer period than five weeks and a reopening of discovery to identify expert witnesses where plaintiff's counsel had sought a continuance just prior to the initial trial date and died soon after that date, and plaintiff was scheduled for spinal surgery during the time set for trial. *See also* ***Lerma v. County of Orange*** (Cal.App. 2004), *below*.

HLC Properties Ltd. v. Superior Court (MCA Records, Inc.) (2d Dist. 2003) 112 Cal.App.4th 305, 4 Cal.Rptr.3d 898, *review granted,* 12/23/2003.
Attorney-client Privilege
Successor Corporation
The California Supreme Court threw into doubt the meaning of "White Christmas" when, virtually on Christmas Eve, it granted review in this case in which the Court of Appeal had held that a limited partnership that is the legal successor to deceased recording artist Bing Crosby's ongoing unincorporated business organization is the holder of the attorney-client privilege of those entities. ***See also Venture Law Group v. Superior Court* (Cal.App. 2004).**

Hoffman v. State Bar of California (1st Dist. 11/21/2003) 113 Cal.App.4th 630, 6 Cal.Rptr.3d 592, 2003 WL 22753543.
Out-of-state lawyer
State Bar Board of Governors
Equal Protection
The Court of Appeal held that the statutes that limit running or voting for the State Bar Board of Governors to licensed California lawyers whose principal law offices are in California do not deny equal protection to a California-licensed lawyer whose principal offices are outside California.

Huskinson & Brown v. Wolf (Cal. 2/23/2004) 32 Cal.4th 453, 84 P.3d 379, 9 Cal.Rptr.3d 693.
Cal. Rule 2-200
Attorney Fees
Fee division
Cal. Rule 2-200
Following its decision in ***Chambers v. Kay*** (2002) 29 Cal.4th 142, 126 Cal.Rptr.2d 536, 56 P.3d 645 the Supreme Court ordered briefing in this case, which had been deferred pending the decision in Chambers, on the following issue:

> "Whether, in the absence of written client consent to an agreement between law firms to divide attorney fees (see Rules Prof. Conduct, rule 2-200), a law firm that is not otherwise entitled to share in such fees may nonetheless recover from the other law firm in quantum meruit for the reasonable value of services it rendered on behalf of the client."

The Supreme Court concluded that the law firm is entitled to recover in quantum meruit for the reasonable value of the services it rendered for the client even if it has not complied with the written disclosure and client consent requirements of rule 2-200. The court reasoned that a quantum meruit " award involves no apportionment of the fees that the client paid or has agreed

to pay and therefore is not a fee division subject to rule 2-200's client disclosure and consent requirements." 32 Cal.4th at 459, 84 P.3d at 382, 9 Cal.Rptr.3d at 697, nor would allowance of such a recovery undermine compliance with rule 2-200 because lawyers ordinarily would prefer to obtain the negotiated fee, which typically far exceeds any quantum meruit recover. *Id.* at 459-460, 84 P.3d 382-83, 9 Cal.Rptr.3d 697-98.

International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, Local No. 16 v. Laughon (1st Dist. 5/27/2004) 118 Cal.App.4th 1380, 14 Cal.Rptr.3d 341.

Arbitration

Arbitrator's Duty to Disclose

Arbitrator in an proceeding concerning a sexual discrimination claim against a union failed to disclose that he had presided as a neutral arbitrator at another non-collective bargaining matter, which involved a different union that was represented by the same law firm representing the union in the present sex discrimination matter. The Court of Appeal held that the arbitrator's failure to disclose that prior relationship violated the disclosure required by Cal. Civ. Pro Code § 1281.9(a)(4), and required vacation of the arbitration award. The court also noted, however, that the arbitrator was not required to disclose his prior service in collective bargaining arbitrations.

Janik v. Rudy, Exelrod & Zieff (1st Dist. 6/22/2004), mod. (7/22/2004) 119 Cal.App.4th 930, 14 Cal.Rptr.3d 751.

Malpractice

Class Action

Limiting Scope of Representation

Relying upon ***Nichols v. Keller*** (1993) 15 Cal.App.4th 1672, 1684, 19 Cal.Rptr.2d 601, which held that "even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention," the Court of Appeal held that class counsel owed the class a duty to explore and pursue an alternative theory of recovery that arguably would have increased the recovery to the class, notwithstanding the fact that the class counsel had achieved a recovery of $90 million. The Court of Appeal therefore reversed the trial court, which had sustained class counsel's demurrer. Plaintiff, who was member of class, had asserted that class counsel should have sued for recovery of overtime wages under the Unfair Competition Law, Bus. & Prof. Code § 17200, which would have allowed recovery for unpaid wages during the four year period prior to the filing of the lawsuit rather than the three year period allowed pursuant to the Labor Code section under which the class action had been filed. The Court of Appeal also held that plaintiff could assert his claim in this separate malpractice action and did not have to raise it in the underlying class action itself.

Jasmine Networks, Inc. v. Marvell Semiconductor, Inc. (6th Dist. 4/8/2004), mod. on denial of rhg. (4/29/2004) 12 Cal.Rptr.3d 123, 2004 Daily Journal D.A.R. 4434, *rev. granted* (7/21/2004).

Attorney-Client Privilege

Crime-Fraud Exception

Waiver

Constituents of corporation inadvertently did not hang up speakerphone after leaving message for third party with whom it was engaged in negotiations for the transfer third party's employees and

trade secret technology, and third party's voicemail system continued to record conversation in which corporate officers and corporation's general counsel openly discussed the theft of third party's trade secrets and unlawful hiring of the employees. Court of Appeal held that attorney-client privilege had been waived as to the communication actually disclosed in the recorded message and that the discussion supported a prima facie case of fraud that in turn supported a finding that the crime fraud exception to the attorney-client privilege had been satisfied. The court wrote: "In an era where corporate fraud and boardroom misconduct is front-page news as well as prosecutions of accountants and lawyers in connection with such conduct, our courts are required to ensure that the attorney-client privilege is not used to promote or further any such conduct." 12 Cal.Rptr.3d at 132.

The California Supreme Court has granted review and stayed further proceedings pending resolution of the appeal in ***Rico v. Mitsubishi*** **(Cal.App. 2004), below.**

Jespersen v. Zubiate-Beauchamp (2d Dist. 12/18/2003) 114 Cal.App.4th 624, 7 Cal.Rptr.3d 715, *rev. denied* (4/14/2004).

Malpractice

Anti-SLAPP Statute

Court concludes that lawyers' motion to strike under the anti-SLAPP (strategic lawsuits against public participation) statute, Code Civ. Proc. § 425.16(b)(1), in a malpractice action filed against the lawyers was frivolous. The court reasoned that, while a legal malpractice action bore some resemblance to a malicious prosecution claim, for which § 425.16(b)(1) provides a remedy, the anti-SLAPP statute was not applicable in this case, as the former clients malpractice claim was not based on the lawyers' having filed declarations in the underlying suit that admitted their malpractice to avoid discovery sanctions, but rather on the lawyers' failure to comply with the discovery statute and two separate court orders to comply with discovery.

Jessen v. Hartford Casualty Ins. Co. (5th Dist. 8/25/2003) 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877.

Conflicts of Interest

Successive Representation

Substantial relationship test

Confidential Information & "Play book" Disqualification

In action for breach of implied covenant of good faith & fair dealing, Insurer was not collaterally estopped by two previous federal court decisions finding that insured's counsel should not be disqualified because of his previous association with Insurer's law firm. Insured's counsel, Wilkins, previously had been associated with Insurer's law firm and had personally represented Insurer in 17 separate matters, most as coverage counsel, but in at least six matters had represented Insurer in bad faith and/or declaratory judgment actions. Rejecting the trial court's reliance on collateral estoppel, the court stressed that on remand the trial court must apply the "substantial relationship test," which it stated turned on: "(1) the relationship between the legal problem involved in the former representation and the legal problem involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation." The court further noted that where the latter factor showed the relationship between lawyer and former client to have been "direct," i.e., "the lawyer was personally involved in providing legal advice and services to the former client," then the lawyer's acquisition of confidential information material to the present suit will be presumed.

Where the relationship was not "direct," then court must inquire whether the lawyer may have been in a position to have acquired confidential information.
See also *Farris v. Fireman's Fund Ins. Co.* (Cal.App. 2004), *above*.

Jevne v. Superior Court (J.B. Oxford Holdings, Inc.) (2d Dist. 11/19/2003) 6 Cal.Rptr.3d 542, 3 Cal. Daily Op. Serv. 10,002, 2003 Daily Journal D.A.R. 12,509, *rev. granted* (3/17/2004).
California Contractual Arbitration Standards
Preemption
California Ethics Standards for Neutral Arbitrators, promulgated by the Judicial Council within the authority granted to it by Code of Civil Procedure § 1281.85. are not preempted by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., but the Standard governing disqualification of arbitrators is preempted by the Securities & Exchange Act of 1934 because it conflicts with NASD regulations.
Supreme Court Watch: The Supreme Court has granted review in this case.

People v. Jones (Cal. 6/24/2004) 33 Cal.4th 234, 91 P.3d 939, 14 Cal.Rptr.3d 579.
Criminal Law
Conflicts of Interest
Disqualification of Defendant's Counsel
The California Supreme Court held that trial court properly exercised its inherent power "[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto," when it disqualified defendant's counsel over defendant's objection and willingness to waive the conflict. In this case, defendant's counsel had previously represented in an unrelated matter a person whom the defense might want to implicate in the murder with which defendant had been accused, and the trial court did not remove defendant's counsel until after it had held three separate in camera conferences on the matter. Quoting the United States Supreme Court, the court noted that "trial courts 'must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.'" 33 Cal.4th at 231, 91 P.3d 939, 14 Cal.Rptr.3d at 584, quoting *Wheat v. United States* (1988) 486 U.S. 153, 163, 108 S.Ct. 1692, 100 L.Ed.2d 140.

In re Josiah Z. (5th Dist. 5/19/2004), mod. (6/14/2004) 13 Cal.Rptr.3d 456, 2004 Daily Journal D.A.R. 5975, 2004 WL 1109854, *rev. granted* (7/28/2004).
Juvenile Law
Appellate Counsel's Authority
Meritorious Claims
California Welfare & Institutions Code § 317(e), which sets for the duties of trial counsel who have been appointed to represent children in dependency hearings does not apply to counsel appoint to represent children on appeal, and court holds that appellate counsel did not have authority to dismiss the children's appeal based on her assessment of her clients' best interests. The court stated that the proper procedure for appellate counsel who, after reviewing the record, believes there is no good faith argument for reversal, is to serve a brief on the appellate court, as respondent, and the trial counsel, after which the appellate court can authorize trial counsel to file

a brief why he or she believes the juvenile court committed prejudicial error. The Supreme Court, however, has granted review.

Matter of Kittrell (State Bar Court Rev. Dept. 11/18/2003) 4 Cal. State Bar Ct. Rptr. 615, 2003 Daily Journal D.A.R. 12,530, 2003 WL 22719318.
Discipline
Business Transactions with Client
Cal. Rule 3-300
Review Court recommended that lawyer be suspended for five years (three years actual suspension) and placed on probation for a wilful violation of rule 3-300, which applies to any transaction under which a lawyer obtains an ownership, possessory, security or other pecuniary interest adverse to a client, and requires that the terms of any agreement by which the lawyer acquires such an interest adverse to the client be "fair and reasonable to the client," that the terms be "fully disclosed" and transmitted in writing to the client "in a manner which should reasonably have been understood by the client," that the client be advised he or she "may seek the advice of an independent counsel" and given an opportunity to so consult, and that the client give his or her informed written consent. In this case, the client invested in a real estate transaction with lawyer and lost her life savings. The court concluded that the lawyer also committed moral turpitude, prohibited by Bus. & Prof. Code § 6106, by concealing from the client, whom he knew to be an unsophisticated investor, the risks of the investment in the real estate transaction and the lawyer's self-dealing with that investment, as well as his failure to honor his promise to repay the client.

United States v. KPMG (D.D.C. 5/4/2004) 316 F.Supp.2d 30.
Attorney-client Privilege
Taxpayer-Tax Adviser Privilege
Identity of Client
Tax Shelters
In tax enforcement action against accountant firm that organized allegedly illegal tax shelters, the identity of the clients who had consulted with accountant firm were not privileged, nor would communications from clients to the accountant firm and the firm's lawyers be deemed privileged unless it could be shown that the documents offering legal or tax advice were in response to communications by a client or prospective client seeking legal advice.

K.R.L. Partnership v. Superior Court (Pemberton) (3d Dist. 7/7/2004), mod. 7/13/2004) 120 Cal.App.4th 490, 15 Cal.Rptr.3d 517.
Attorney Fees
Proper Venue
After lawyer successfully moved to transfer malpractice action former clients had filed against him, lawyer filed cross-complaint for breach of contract for monies owed under the retainer agreement. Court held that clients could not move to change venue based on allegations contained in the cross-complaint once proper venue had been established under the original complaint.

La Jolla Cove Motel and Hotel Apartments, Inc. v. Superior Court (Jackman) (4th Dist. 8/16/2004) ___ Cal.App.4th ___, ___ Cal.Rptr.3d ___, 2004 WL 1813854.
Communication with Represented Party
Cal. Rule 2-100
Duty of Confidentiality
Attorney Disqualification
In action to dissolve closely-held corporation and for an accounting, Court of Appeal held that lawyers for minority shareholder and former president of corporation did not violate Cal. Rule 2-100 and may communicate directly with directors of corporation so long as counsel for directors gave consent to the communication, even if corporation counsel had not consented. The court reasoned that given the numerous lawsuits between the corporate majority and minority, the interests of the directors, who had been appointed by former president to protect minority interests in the corporation, were adverse to those of the corporation, and so the corporation's counsel could not be said to represent the directors. The court also stated that even if rule 2-100 could have been found to have been violated, the disqualification of the minority shareholder's lawyers was not warranted where there was no evidence that the directors had disclosed confidential corporate information to the lawyers.

Lamie v. United States Trustee (U.S. 1/26/2004) ___ U.S. ___, 124 S.Ct. 1023, 157 L.Ed.2d 1024, 72 USLW 4152, 2004 Daily Journal D.A.R. 805.
Attorney Fees
Bankruptcy
Statutory Construction
Debtor's counsel, who continued to represent debtor after the case had been converted from a Chapter 11 (reorganization) to a Chapter 7 (liquidation) proceeding, filed petition for attorney fees for services provided pre-petition, during the chapter 11 proceedings and after conversion to a chapter 7 proceeding, but the Bankruptcy Trustee objected to payment for post-conversion services. The Supreme Court held that the 11 U.S.C. §§ 327 and 330(a) do not permit compensation of the debtor's attorney in a Chapter 7 proceeding unless the attorney is employed by the trustee and approved by the court.

Lapidus v. City of Wasco (1st Dist. 1/21/2004) 114 Cal.App.4th 1361, 8 Cal.Rptr.3d 680, rev. denied (4/14/2004).
Attorney Fees
Contingent Fee
Municipal Corporation
The Court of Appeal held that the City of Wasco must make good on the debt it owed lawyer under a contingency fee contract notwithstanding article XVI, section 18 of the California Constitution, which prohibits a city from incurring any indebtedness or liability exceeding in any year the income and revenue of the city for that year, without approval of two-thirds of the qualified voters of the city. The court emphasized that payment of the fees would not place a charge on the city's general funds.

Lempert v. Superior Court (Campbell) (6th Dist. 10/24/2003) 112 Cal.App.4th 1161, 5 Cal.Rptr.3d 700.
Criminal Law
Discrete Task Representation
Court holds that a lawyer who previously had agreed to represent client criminal defendant through the preliminary hearing stage only is not required to make a formal motion to withdraw from the case once the client is arraigned.

Lerma v. County of Orange (4th Dist. 7/13/2004) 120 Cal.App.4th 709, 15 Cal.Rptr.3d 609, 4 Cal. Daily Op. Serv. 6248, 2004 Daily Journal D.A.R. 8493.
Attorney Illness
Trial Continuance
Trial court committed error in denying plaintiff's request for continuance of summary judgment motion where plaintiff's counsel was hospitalized with cancer and at first unaware even that the summary judgment motion had been filed, and then was not sufficiently healthy to adequately respond to the motion. *See also* ***Hernandez v. Superior Court*** (Cal.App. 2004), *above*.

Matter of Lindmark (State Bar Court Rev. Dept. 3/15/2004) 4 Cal. Daily Op. Serv. 2420, 2004 Daily Journal D.A.R. 3514, 2004 WL 541864.
Discipline
Advance Fee vs. Retainer
Cal. Rule 3-700
Review Court recommended that lawyer be given a public reproval for failing to return to client a $5,000 advance fee, to which lawyer claimed he was entitled even though the original, unmodified fee agreement was for a contingent fee.

Liska v. Arns Law Firm (1st Dist. 3/30/2004) 117 Cal.App.4th 275, 12 Cal.Rptr.3d 21.
Malpractice
Mandatory Fee Arbitration
Collateral Estoppel
Client who lost a fee dispute under California's Mandatory Fee Arbitration Act (MFAA), Cal. Bus. & Prof. Code §§ 6200 et seq., is not precluded from subsequently filing a malpractice action that is based on the conduct that formed the basis for the original fee dispute. In reaching its decision the Court of Appeal reasoned that in agreeing to binding arbitration of their fee dispute under the MFAA, the parties did not also agree to be bound by all determinations made by the arbitrators, including factual determinations, and so any such fact findings made by the arbitrators did not have collateral estoppel effect.

People ex rel Lockyer v. Brar (4th Dist. 2/24/2004) 115 Cal.App.4th 1315, 9 Cal.Rptr.3d 844.
Injunction
Cal. Bus. & Prof. Code § 17200
Anti-SLAPP suit
Meritorious Claim
Defendant's appeal of the denial of his anti-SLAPP motion in action brought by Attorney General to enjoin defendant from filing further suits under Cal. Bus. & Prof. Code § 17200 was "patently

frivolous" and interposed for delay only as actions by the Attorney General are exempt from the anti-SLAPP statute, and so appeal's dismissal (rather than affirmance of motion's denial) was proper remedy.

McCaffrey v. Brobeck, Phleger & Harrison, LLP (N.D.Cal. 2/17/2004) 2004 WL 345231, 20 IER Cases 1706.
Law Firm Dissolution & Acquisition
Federal & State WARN Act Liability
Law firm that hired 57 partners, 100 associates and 150 staff members of dissolved law firm may be liable under the federal Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§2101 et seq., and its California analog, Cal. Lab. Code §§1400 et seq., both of which require 60 days notice to employees of their impending termination, and also under California's unfair competition law, Cal. Bus. & Prof. Code § 17200.

McIntosh v. Mills (1st Dist. 8/3/2004) ___ Cal.App.4th ___, 17 Cal.Rptr.3d 66, 4 Cal. Daily Op. Serv. 6992, 2004 Daily Journal D.A.R. 9468, 2004 WL 1729495.
Attorney Fees
Fee Sharing
Non-lawyers
Rule 1-320
Cal. Rule 1-320, which provides that a lawyer may not share a fee with a non-lawyer, rendered unenforceable as illegal an agreement between a lawyer and non-lawyer to share a legal fee, notwithstanding the fact that the Rules of Professional Conduct did not apply to the non-lawyer. The court held that the fee sharing agreement was *malum prohibitum* (illegality set by statute) rather than *malum in se* (illegality based on base morals), and therefore typically subject to the *in pari delicto* exception, which is intended to prevent a contracting party from using the illegality doctrine to create an unfair windfall, and which permits enforcement if the party enforcing the contract is less morally blameworthy than the party against whom the contract is being enforced. Notwithstanding the fact that the non-lawyer was not subject to rule 1-320, however, the in pari delictco exception was not applicable in this case because in negotiating the agreement with the lawyer, the non-lawyer had been represented by a lawyer who, as agent for the non-lawyer, had entered into the agreement. Not only was the agent lawyer prohibited from assisting in the violation of rule 1-320, see rule 1-120, the agent lawyer's knowledge of the illegality of the fee sharing agreement was imputed to the non-lawyer. The court concluded: "the entire affair surrounding the alleged sharing of [the] attorney fee . . . is nothing less than an appalling abuse of this state's civil justice system by all three principals [in the scheme]."

McKesson HBOC, Inc. v. Superior Court (State of Oregon) (1st Dist. 2/20/2004) 115 Cal.App.4th 1229, 9 Cal.Rptr.3d 812, rev. denied (6/9/2004).
Attorney-Client Privilege
Waiver/Agreement with Government
Court of Appeal held that corporation waived the attorney client privilege and work product immunity as to an audit report and interview memoranda, which were prepared by its attorneys and which it had provided to the SEC and federal prosecutors during the government's investigation of the corporation for securities fraud, and therefore the corporation was obligated to produce those otherwise privileged documents to plaintiffs in a civil action for securities fraud.

Maggi v. Superior Court (Alkosser) (4th Dist. 6/29/2004) 119 Cal.App.4th 1218, 15 Cal.Rptr.3d 161.
Confidential Information
Third-party Witnesses
Court order
Right of Free Speech
Court of Appeal held that trial court's prohibiting plaintiff investors and their lawyers from contacting non-party witnesses as a sanction for violating protective order, under which the parties agreed not to share confidential documents with third parties, was a violation of the First Amendment rights of the investors and their counsel.

Matter of Malek-Yonan (State Bar Court Rev. Dept. 12/26/2003) 4 Cal. State Bar Ct. Rptr. 627, 2004 Daily Journal D.A.R. 53, 2003 WL 23095707.
Discipline
Trust Accounts
Duty to Supervise Staff
Review Court recommended that lawyer be suspended for a period of five years, with execution stayed, on condition of five years probation, including actual suspension for eighteen months, for failing to have adequate office procedures in place to protect her client funds and to adequately supervise her subordinate staff to ensure that those procedures were followed, rule 4-100, which the review department concluded constituted gross negligence involving moral turpitude, Bus. & Prof. Code § 6106, where the lawyer had authorized her bookkeeper to sign all checks using a rubber stamp of her signature, the lawyer did not personally review any of the bank statements from her client trust account, never compared the settlement checks she received with the deposits in the trust account, did not look at any of the cancelled checks for any of her accounts, and never checked or reconciled the trust account, and the bookkeeper and other employees stole money from the client accounts, as well as client files.

Maravilla v. Ashcroft (9th Cir. 8/19/2004) ___ F.3d ___, 2004 WL 1853455.
Immigration Law
Ineffective Assistance of Counsel
In seeking the cancellation of a removal order on the ground that their lawyer provided ineffective assistance of counsel, aliens need only show that their lawyer's performance "may have affected the outcome of the proceedings," and so the Bureau of Immigration Appeal's denial of the motion was an abuse of discretion where the BIA had concluded the aliens had not shown that "the outcome would have been different *but for* the alleged ineffectiveness" of their lawyer. On

remand, the BIA must (1) consider whether competent counsel would have acted otherwise, and, if so, (2) consider under the "may have affected" standard whether petitioners were thereby prejudiced." Petitioners had been represented by Miguel Gadda, who had been disbarred. *See* ***Gadda v. Ashcroft*** (9th Cir. 2004) 363 F.3d 861, *as amended* (7/20/2004) 363 F.3d 861, *above.*

In re Death of Miller (N.C. 8/22/2003) 584 S.E.2d 772.
Attorney-Client Privilege
Death of Client
Man being investigated for death of husband of co-worker with whom he was having an affair committed suicide. Prosecutor, believing man disclosed information to his attorney that would implicate wife, subpoenaed attorney to testify. The North Carolina Supreme Court, in apparent disagreement with the United States Supreme Court, which had ruled in *Swidler & Berlin v. United States* (1998) 524 U.S. 399, 118 S.Ct. 2081, 141 L.Ed.2d 379 (the Vincent Foster case) that the attorney-client privilege survived death, held that the attorney-client privilege may be pierced post-mortem under certain circumstances. The court explained that there are three different general situations in which the court will be forced to decide whether to compel the deceased's lawyer to reveal a privileged communication: (1) if the communication will incriminate the deceased client, it is privileged and cannot be revealed; (2) if the communication incriminates a third party but not the deceased client, its disclosure can be compelled; (3) if, however, the communication incriminates a third party but also affects the deceased client's interests, the lawyer must testify only if Govt. can show by clear & convincing evidence that: (1) the client's estate will not be exposed to civil liability *and* (2) disclosure is not likely to result in harm to loved ones or reputation. To resolve the foregoing issues, the trial court would be empowered to conduct an in camera view of the communication's substance to make its determination.
See also ***State v. Doe*** **(Ohio 2004)*, above*.**

Mink v. Maccabbee (2d Dist. 8/17/2004) ___ Cal.App.4th ___, ___ Cal.Rptr.2d ___, 2004 WL 1832986.
Attorney Fees
Fee division
Cal. Rule 2-200
Court of Appeal held that the written consent of client for division of fees between lawyers under Cal. Rule 2-200 need not be obtained prior to the lawyer's entering into the agreement, or even before the provision of legal services to the client, so long as it is obtained before the lawyers divide the fees. The court also noted that the fee division agreement itself need not be in writing and, citing to ***Huskinson & Brown v. Wolf*** (2004) 32 Cal.4th 453, 9 Cal.Rptr.3d 693, 84 P.3d 379, above, held that the plaintiff lawyer's claim for quantum meruit also survived defendant's demurrer.

Moore v. Shaw (2d Dist. 2/26/2004), mod. (3/26/2004) 116 Cal.App.4th 182, 10 Cal.Rptr.3d 154.
Malpractice
Third-party Liability
Anti-SLAPP suit
Attorney Fees
Lawyer defended against malpractice action for negligently drafting an agreement to terminate a

trust prematurely by filing an anti-SLAPP motion. The Court of Appeal held that the lawyer could not have reasonably believed that drafting an agreement to terminate a trust was in furtherance of her right to petition or free speech, or was somehow otherwise related to a matter of public importance. Therefore, the anti-SLAPP motion was frivolous and plaintiff, former client, was entitled to attorney fees for having to defend against lawyer's motion.

Moran v. Oso Valley Greenbelt Ass'n (4th Dist. 4/8/2004) 117 Cal.App.4th 1029, 12 Cal.Rptr.3d 435.
Attorney Fees
Pro bono representation
Court of appeal held that plaintiff was entitled to attorney fees pursuant to Corporations Code section 8337, which permits the award of fees "if the court finds the failure of the corporation to comply with a proper demand [under the act] was without justification," even though plaintiff was being represented pro bono by the law firm for which she worked.

Nicholson v. Fazeli (6th Dist. 12/1/2003) 113 Cal.App.4th 1091, 6 Cal.Rptr.3d 881.
Malicious Prosecution
Family Law
Res judicata/claim preclusion
Wife's malicious prosecution claim against her husband, the trustees of a trust and the trust's lawyer alleging that they had filed a cross-complaint in the underlying dissolution proceeding without probable cause was not subject to the bar against malicious prosecution suits arising from family law matters. See, e.g., ***Bidna v. Rosen*** (1993) 19 Cal.App.4th 27, 23 Cal.Rptr.2d 251; *Begier v. Strom* (1996) 46 Cal.App.4th 877, 54 Cal.Rptr.2d 158. The court reasoned that the cross-complaint filed by the trust and the trust's lawyer did not raise any family law issues, i.e., it did not involve marital status, child custody or spousal support, and the trust did not characterize the property at issue as community property, but rather as "trust property." In short, the court concluded it was simply "a civil action for possession of property alleged to be trust property and damages for the loss of trust property." 113 Cal.App.4th at 1098-99, 6 Cal.Rptr.3d at 888.

O'Flaherty v. Belgum (2d Dist. 1/29/2004) 115 Cal.App.4th 1044, 9 Cal.Rptr.3d 286, rev. denied (4/14/2004).
Arbitration
Firm Dissolution
Arbitrator exceeded his authority in law firm dissolution when he declared a forfeiture of the withdrawing partners' capital accounts where the arbitration clause in the partnership agreement provided that an arbitrator could not grant a remedy that the agreement prohibited or which was "not available in a court of law."

Matter of Oheb (State Bar Rev. Ct. 7/16/2004) ___ Cal. State Bar. Ct. Rptr. ___, 4 Cal. Daily Op. Serv. 6486, 2004 Daily Journal D.A.R. 8825, 2004 WL 1622462.
Discipline
Attorney Criminal Conviction
Bus. & Prof. Code § 6102(c).
Review Court recommended that lawyer be placed on four years' stayed suspension and on four years' probation with conditions, including two years' actual suspension with credit given for the period of respondent's interim suspension after having been convicted on two felony counts of

violating Penal Code § 549 for accepting referrals of personal injury clients with reckless disregard for whether the referring party or the referred clients intended to make false or fraudulent insurance claims. In imposing the sanction, the Review Court rejected the State Bar's argument that automatic disbarment should be imposed under Bus. & Prof. Code § 6102(c) for any conviction of a felony involving moral turpitude in its surrounding circumstances and not just for convictions of felonies that inherently involve moral turpitude (e.g., felonies that have as an element the specific intent to deceive, defraud, steal, or make or suborn a false statement, or where the crime occurs in the course of the lawyer's practice or the client is the victim).

OXY Resources California LLC v. Superior Court (Calpine Natural Gas LP) (1st Dist. 2/11/2004), *mod*. (3/4/2004) 115 Cal.App.4th 874, 9 Cal.Rptr.3d 621.

Attorney-Client Privilege
Work Product Immunity
Joint Defense Agreement
Common Interest Doctrine

The Court of Appeal held that a "joint defense agreement" between two parties to a business transaction could form the basis for the parties to refuse to produce certain documents the parties shared during the transaction to a third party that sued them on the grounds that it had been denied its right to exercise first refusal in the subject matter of the transaction. The court noted, however, that the joint defense agreement was not a simple panacea to withstand future discovery requests. The documents being sought still must otherwise be protected by the privilege (e.g., information shared by a client with counsel or a legal opinion given by counsel), or protected under work product immunity (i.e., a writing that reflects an attorney's impressions or theories). The trial court therefore will have to review the allegedly privileged documents *in camera*. In reaching its decision, the court also rejected the third party's argument that the joint defense agreement was void as against public policy because it resulted in the suppression of evidence. The court, however, reasoned that the agreement would only protect otherwise privileged documents and not suppress the discovery of otherwise discoverable documents.

Padres L.P. v. Henderson (4th Dist. 12/17/2003) 114 Cal.App.4th 495, 8 Cal.Rptr.3d 584, 2003 WL 22962187.

Malicious Prosecution
Anti-SLAPP Statute

In a suit arising out of the attempt by San Diego to build a new baseball stadium, court holds that notwithstanding rule that a government entity cannot bring a malicious prosecution action, a lawyer who had filed numerous lawsuits to prevent the stadium construction was not absolutely privileged from being subject to such lawsuits, and thus a private entity, the San Diego baseball club, which had prevailed in the underlying actions with the government, can assert a malicious prosecution action against. The court also held that the ball club had satisfied its burden of showing the lawyer lacked probable cause for filing one of three related underlying suits.

Partida v. Union Pacific RR Co. (C.D.Cal. 5/17/2004) 221 F.R.D. 623.

Communication with Represented Party
Cal. Rule 2-100

Court held that defendant employer's ex parte communications with plaintiff employee, who was injured on the job and had brought action under the Federal Employees Liability Act (FELA), demanding that employee submit to examination by company doctor violated Cal. Rule of Prof.

Conduct 2-100 and discovery rules, so employee was entitled to protective order preventing employer from making the ex parte demands or disciplining employee for not complying with the demands. The court noted that employee's claim that the employer had violated rule 2-100 was not preempted by the Railway Labor Act because the rights employee asserted were independent of collective bargaining. Finally, the court refused to award employee attorney fees because the employer had a basis for its actions given the conflict law.

People v. Pigage (Cal.App. 4th Dist. 10/30/2003) 112 Cal.App.4th 1359, 6 Cal.Rptr.3d 88
Prosecutorial Misconduct
Although prosecutor's arguing to jury that defendant's absence from trial was evidence of guilt despite trial court's order not to do so was "outrageous misconduct," regardless of whether the trial court's order was correct, defendant was not entitled to a reversal of his conviction on grounds that his due process rights had been violated, where trial court immediately warned prosecutor and gave cautionary instruction to the jury. Despite the court's ultimate decision, it ordered that a copy of the opinion be forwarded to the State Bar "for review and further proceedings."

Pincay v. Andrews (9th Cir. 12/10/2003) 351 F.3d 947, 2003 WL 22902636, 3 Cal. Daily Op. Serv. 10,626, *rhg. en banc granted*, 367 F.3d 1087 (5/7/2004).
Subordinate Staff
Excusable Neglect
Law firm was not excused for missing the deadline for filing appeal of trial court's ruling where the lawyer responsible for the case had relied on the firm's docket clerk's calculation of the deadline for filing notice of appeal. Compare ***Hu v. Fang*** (12/5/2002) 104 Cal.App.4th 61, 127 Cal.Rptr.2d 756; ***Duran v. St. Luke's Hospital*** (1st Dist. 12/16/2003) 114 Cal.App.4th 457, 8 Cal.Rptr.3d 1, 2003 WL 22953650.

Pour le Bebe, Inc. v. Guess? Inc. (Cal.App. 10/15/2003) 112 Cal.App.4th 810, 5 Cal.Rptr.3d 442.
Arbitration
Conflicts of Interest
An arbitration panel's decision to deny licensee's motion to disqualify licensor's counsel in arbitration was subject to collateral attack when licensee sought to reverse arbitrator's award against it, as the denial of the disqualification motion had not previously been subject to appeal. The court went on, however, to conclude that the alleged conflict of interest would not support a finding that the arbitration award was obtained by "other undue means," and so the award would not be vacated. This case grew out of the same set of facts as ***Benasra v. Mitchell, Silberberg & Knupp*** **(Cal.App. 2d Dist. 2/13/02) 96 Cal.App.4th 96, 116 Cal.Rptr.2d 644**, where the court held that the arbitration panel's denial of the disqualification motion was not *res judicata*, thereby allowing the licensee to sue the firm on the alleged conflict of interest.

Redante v. Yockelson (Cal.App. 4th Dist. 10/30/2003) 112 Cal.App.4th 1351, 6 Cal.Rptr.3d 10.

Ineffective Assistance
Malpractice

Criminal defendant could not sue his appellate lawyer for malpractice after habeas proceeding in which court concluded that lawyer had not provided ineffective assistance by refusing to assert issues the client wanted argued and which the lawyer believed had no merit. The requirement that a criminal defendant must prove actual innocence before proceeding on a malpractice claim applies to both appellate and trial counsel.

Reeves v. Hanlon (8/12/2004) ___ Cal.4th ___, ___ P.3d ___, ___ Cal.Rptr.3d ___, 2004 WL 1794708.

Lawyer leaving firm
Duties to other lawyers and clients
Intentional interference with contractual relations

The California Supreme Court affirmed the Court of Appeal and held generally that a plaintiff may recover damages for tortious interference with contractual relations, disapproving ***GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.*** (2000) 83 Cal.App.4th 409, 99 Cal.Rptr.2d 665. The court emphasized that "a plaintiff must plead and prove that the defendant engaged in an independently wrongful act--i.e., an act 'proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard,'" Id. at ___, and held that in this case, that lawyers who left law firm were liable by their having recruited law firm's at-will employees for their new firm as part of a "campaign" against the former firm, which included destroying former firm's computer records and misusing the former firm's confidential information. The court also found that the lawyers who left the firm had violated California's Uniform Trade Secrets Act, Civ.Code, § 3426 et seq., by misappropriating the firm's client list. Finally, in footnote 9, the court criticized the announcement the leaving lawyers had provided the clients, and directed lawyers to consider the appropriate approach to contacting clients when leaving a firm: "In recognition of the principle that the professional obligation of attorneys to their clients requires attorneys to provide for an orderly transition in the event of an employment change, Formal Opinion No.1985-86 of the State Bar Standing Committee on Professional Responsibility and Conduct provides that departing attorneys should cooperate with their former employers to arrange for the issuance of a joint notice to clients. Here, defendants prepared and distributed their business announcement without seeking plaintiffs' input or approval."

Rico v. Mitsubishi Motors Corp. (4th Dist. 2/25/2004) 10 Cal.Rptr.3d 601, 4 Cal. Daily Op. Serv. 1627, 2004 Daily Journal D.A.R. 2417, *rev. granted* (6/9/2004).

Work Product Immunity
Inadvertent Disclosure
Waiver
Misuse of Work Product/Attorney Disqualification

Lawyer who in advertently had obtained a copy of opposing party's lawyer's work product (a document summarizing a conference between the lawyer and opposing party's experts) acted unethically by not notifying opposing party that he had the document in his possession and using it to impeach the testimony of the experts. The court concluded that appropriate sanction was

disqualification of the lawyer and the lawyer's firm. The Supreme Court has granted review in this case to resolve the following issue:

> "Did the trial court properly disqualify plaintiffs' attorneys and plaintiffs' expert witnesses as a sanction when an attorney representing one of the plaintiffs, after inadvertently receiving a document prepared by defense counsel that included confidential work product, extensively reviewed the document with the attorneys representing other plaintiffs and with plaintiffs' expert witnesses?" See ***State Compensation Ins. Fund v. WPS, Inc.*** (1999) 70 Cal.App.4th 644, 82 Cal.Rptr.2d 799; ***Aerojet-General Corp. v. Transport Indemnity Ins.*** (1993) 18 Cal.App.4th 996, 22 Cal.Rptr.2d 862.

See also ***Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*** **(Cal.App. 2004).**

Rietveld v. Rosebud Storage Partners, L.P. (3d Dist. 7/30/2004) ___ Cal.App.4th ___, 16 Cal.Rptr.3d 791, 4 Cal. Daily Op. Serv. 6970, 2004 Daily Journal D.A.R. 9434, 2004 WL 1701112.
Arbitration
Attorney Obligation to Participate
Attorney Sanctions
In employment action alleging breach of contract and fraud, court imposed $2,380 in sanctions on attorney for plaintiff's for failing to "participate meaningfully in judicial arbitration" by not submitting an arbitration brief, failing to have his clients available during the arbitration and failure to present evidence to support the client's case.

Rojas v. Superior Court(Coffin) (7/12/2004) 33 Cal.4th 407, 93 P.3d 260, 15 Cal.Rptr.3d 643, 4 Cal. Daily Op. Serv. 6189, 2004 Daily Journal D.A.R. 8387, 2004 WL 1542239.
Mediation
Mediation privilege
Work product immunity
In reversing the Court of Appeal, the California Supreme Court held that the privilege under Cal. Evid. Code § 1119(b) for a "writing . . . that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" applied to photographs, witness statements and analyses of raw data prepared for a mediation involving construction defect litigation between owners and builder's of apartment building, and therefore the material was not available to tenants in their subsequent law suit against the owners and builders. The court also held that the mediation privilege is not subject to a "good cause" exception, noting that the Court of Appeal erred by importing that concept from the law of work product, for which the exception is expressly provided by statute. Only express statutory exceptions to the privilege will be given effect.

Rus, Miliband & Smith v. Conkle & Olesten (4th Dist. 11/21/2003) 113 Cal.App.4th 656, 6 Cal.Rptr.3d 612.
Attorney Fees
Attorney-Client Relationship
Quantum Meruit
Attorneys who withdrew from representing client in bad faith action against client's insurer because of an alleged "break-down in communications" were not entitled to a quantum meruit

recovery of attorney's fees after the client prevailed in its action. Citing to ***Estate of Falco*** (1987) 188 Cal.App.3d 1004, 233 Cal.Rptr. 807, the court noted that subjective belief in the merits of the action at the time of withdrawal does not entitle a lawyer to a fee recovery; rather, the court must inquire whether "the cause for withdrawal is *sufficiently* justifiable *so as* to permit recovery by the withdrawn attorney." (Emphasis in original) The court concluded that the law firm had not met that standard in explaining its withdrawal.

Saeta v. Superior Court (Dent) (2d Dist. 3/30/2004) 117 Cal.App.4th 261, 11 Cal.Rptr.3d 610.
Third Party Neutral Privilege
Right to Privacy
A termination review board constituted pursuant to a contract between and insurance company and an agent employee was neither an arbitration nor mediation, so it was not subject to either the arbitration or mediation privileges in Cal. Evid. Code §§ 703.5 or 1119, respectively. Therefore, retired judge who sat on the review board could be compelled to testify at his deposition in an action brought by the employee against the employer. The court also held that an order compelling the former judge to testify did not violate his privacy rights under the California Constitution, Art. I, section 1.

City & County of San Francisco v. Cobra Solutions, Inc. (1st Dist. 6/10/2004), *mod*. (6/15/2004) 119 Cal.App.4th 304, 14 Cal.Rptr.3d 400.
Government Lawyer
Ethical Screen
Court of Appeal affirmed the trial court's grant of defendant's motion to disqualify the City Attorney and the entire City Attorney's office where the City Attorney had personally represented defendant and had obtained confidential information from defendant, and where the subject of the prior representation was substantially related to the current lawsuit. The court held that where a lawyer leaves private practice to become the "*head* of a public law office," no ethical screen can adequately the special concerns that arise. Id. At 316, 14 Cal.Rptr.3d at 408-409 (Emphasis in original). The court, however, expressly declined to address whether an ethical screen would be effective when a lawyer leave private practice for a subordinate position in a public law office. *Id.*

Santa Teresa Citizen Action Group v. City of San Jose (6th Dist. 12/18/2003) 114 Cal.App.4th 689, 7 Cal.Rptr.3d 868.
Conflicts of Interest
Successive Representation
Substantial Relationship
Water company moved to disqualify two lawyers for a competitor water company on the grounds that one of the lawyers had previously represented it in a substantially-related matter and the other because she had worked closely with the first lawyer in this case. The Court of Appeal affirmed the trial court's denial of the motion, noting that it was arguable that the two water companies were not adverse and, even if they were, the disqualification of counsel was based on the fact that the first company had disclosed its confidential business plans to the lawyer. However, because those plans were not relevant to the resolution of the issues in this case, the court concluded that the attorney who had actually represented the first water company did not have to be disqualified and, because that lawyer was not subject to recusal, neither was the second lawyer who had worked closely with the first on the case.

Scarborough v. Principi (U.S. 5/3/2004) 124 S.Ct. 1856, 41 U.S.L.W. 4340, 2004 Daily Journal D.A.R. 5285, 41 USLW 4340.
Attorney Fees
Civil Rights
Equal Access To Justice Act
A timely fee application under the Equal Access to Justice Act, pursuant to 28 U.S.C. § 2412(d), may be amended after the 30-day filing period has run to cure an initial failure to allege that the Government's position in the underlying litigation lacked substantial justification.

Shapiro v. Paradise Valley Unified School District No. 69 (9th Cir. 7/6/2004) 374 F.3d 857, 4 Cal. Daily Op. Serv. 6049, 2004 Daily Journal D.A.R. 8220.
Attorney Fees
Pro Hac Vice Admission
In action successfully brought by parents against school district under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1487, the award of attorney fees would not include payment for any services the lawyer for parents provided before he was admitted *pro hac vice* to state court.

Shooker v. Superior Court (8/28/2003) 111 Cal.App.4th 923, 4 Cal.Rptr.3d 334, 3 Cal. Daily Op. Serv. 7952, 2003 Daily Journal D.A.R. 9869.
Attorney-client privilege
Waiver
Expert Witness
Plaintiff's merely designating himself as an expert witness in lawsuit against former partner did not by itself waive the attorney-client privilege attaching to communications between plaintiff and his lawyer, where plaintiff stopped his expert deposition before actually disclosing any confidential information and then removed himself as an expert from the case.

In re Shoup (C.D.Cal. 1/21/2004) 307 B.R. 164.
Bankruptcy Preparer
Handling Client Funds
Court held that 11 U.S.C. § 110(g)(1), which prohibits a bankruptcy preparer from "collect[ing] or receiv[ing] any payment" from the debtor, not only precludes a bankruptcy petition preparer from collecting court filing fees for his or her own account out of which the preparer would pay the debtor's filing fee, but also precludes the preparer from simply receiving from the debtor a check payable to the bankruptcy court, and affirmed imposition of sanctions on the preparer. See also ***In re Buck***, above.

Siebel v. Mittlesteadt (6th Dist. 5/6/2004) 118 Cal.App.4th 406, 12 Cal.Rptr.3d 906.
Attorneys
Malicious Prosecution
Corporation's CEO, who had prevailed in an underlying suit alleging sex discrimination and wrongful termination, did not waive his right to bring a malicious prosecution action against the lawyers for plaintiff in the underlying litigation by settling the suit after a jury verdict in his favor. The malicious prosecution plaintiff (i.e., the CEO) had obtained a "favorable termination" in the underlying suit and, under the post-verdict settlement, the parties agreed only to abandon their respective appeals. The settlement did include a release of the plaintiff employee in the underlying suit but expressly did not exclude a release for plaintiff's lawyers.

Matter of Silverton (State Bar Ct. Rev. Dept. 1/6/2004) 4 Cal. Daily Op. Serv. 282, 2004 Daily Journal D.A.R. 356, 2004 WL 60709.
Discipline
Taking Interest Adverse to Client (Rule 3-300)
Unconscionable Fee (Rule 4-200)
Review Court recommended that lawyer be placed on two years' stayed suspension and on three years' probation with conditions, which included a sixty-day period of actual suspension, for two counts of violating rule 3-300, and two counts of charging an unconscionable fee in violation of rule 4-200. The lawyer had agreed to negotiate reductions in his clients' medical bills and keep any savings as an additional fee. The Review Department determined that In two of the cases, the review judges said this amounted to collecting an unconscionable fee from his clients in two matters. The Review Department also concluded that the agreements in those two same matters violated rule 3-300 because the lawyer failed to assure that the terms were fair and reasonable to the client.

Soukup v. Stock (2d Dist. 5/27/2004), mod. On rhg. (6/21/2004) 15 Cal.Rptr.3d 303, 118 Cal.App.4th 1490.
Malicious Prosecution
Anti-SLAPP statute
Attorney Fees
Court of Appeal reversed the trial court's denial of motion to strike under anti-SLAPP (strategic lawsuit against public participation) statute filed by employer's lawyer, who had been sued for malicious prosecution after filing a meritless lawsuit against former employee. The court reasoned that because he had been acting as an advocate on behalf of his clients, and that a lawyer "may rely upon his or her exercise of free expression rights while providing legal representation in an underlying lawsuit as a basis for a special motion to strike in subsequent litigation." *Id.* at 308, 118 Cal.App.4th 1490. The court also held, however, that lawyer, who had represented himself, was not entitled to attorney fees.

Snider v. Superior Court (Quantum Prod., Inc.) (4th Dist. 12/3/2003) 113 Cal.App.4th 1187, 7 Cal.Rptr.3d 119, 3 Cal. Daily Op. Serv. 10,390, 2003 Daily Journal D.A.R. 13,056.
Communications With Represented Persons
Cal. Rule Prof. Conduct 2-100
In an exhaustive consideration of California Rule of Professional Conduct 2-100, the Court of Appeal held that a lawyer did not violate the rule by contacting a sales manager or director for production of the client's former corporate employer as those employees were not directors, officers or "managing agents" within the meaning of rule 2-100(B)(1) and thus not represented

parties of the corporation. The court defined a "managing agent" as "those employees that exercise substantial discretionary authority over decisions that determine organizational policy." The court also concluded that paragraph (B)(2) of the rule did not apply as the contacted employees were not persons whose statements might constitute an admission on the part of the corporation, nor could the subject matter of communication be imputed to the corporation. The court, however, went on to provide guidance on how lawyers should comport themselves when communicating with an employee of an opposing party:

> "Nevertheless, to avoid potential violations of the attorney- client privilege, an attorney contacting an employee of a represented organization should question the employee at the beginning of the conversation, before discussing substantive matters, about the employee's status at that organization, whether the employee is represented by counsel, and whether the employee has spoken to the organization's counsel concerning the matter at issue. If a question arises concerning whether the employee would be covered by rule 2-100 or is in possession of privileged information, the communication should be terminated. Once a dispute arises that could lead to litigation, it is also incumbent upon an organization and its counsel to take proactive measures to protect against disclosure of privileged information by informing employees and/or opposing counsel their position concerning communications between employees and opposing counsel. The exercise of caution and prudence on both sides will avoid much of the potential for violations of rule 2-100 or breach of attorney-client relationships."

Finally, citing to ***Jorgensen v. Taco Bell Corp.*** (1996) 50 Cal.App.4th 1398, 1403, 58 Cal.Rptr.2d 178 and ***Truitt v. Superior Court*** (1997) 59 Cal.App.4th 1183, 69 Cal.Rptr.2d 558, the court confirmed that before rule 2-100 can be violated, the lawyer must have actual knowledge that the employee is represented. Notwithstanding its conclusion concerning "actual knowledge," the court stated:

> "We emphasize, however, that in cases where an attorney has reason to believe that an employee of a represented organization might be covered by rule 2-100, that attorney would be well advised to either conduct discovery or communicate with opposing counsel concerning the employee's status before contacting the employee. A failure to do so may, along with other facts, constitute circumstantial evidence that an attorney had actual knowledge that an employee fell within the scope of rule 2-100. It might further provide support for a more drastic sanction if a violation of rule 2-100 is found."

Stankewitz v. Woodford (9th Cir. 4/8/2004) 365 F.3d 706, 4 Cal. Daily Op. Serv. 3052, 2004 Daily Journal D.A.R. 4365.

Ineffective Assistance of Counsel

Attorney's Religion

Although the Ninth Circuit concluded that defense counsel had provided ineffective assistance of counsel in the penalty phase of a capital case by failing to investigate and present evidence of the defendant's history of mental illness and substance abuse, as well as evidence of defendants severe mistreatment as a child, the court rejected defendant's argument that defense counsel's religion had created a conflict of interest that mandated reversal. The court noted that defendant had cited no authority for such a theory, nor did the mere fact that during closing argument defense counsel mentioned the Bible and the power of God to change peoples' lives render his assistance to defendant ineffective.

Stroock & Stroock & Lavan LLP v. Tendler (2d Dist. 9/22/2002) 125 Cal.Rptr.2d 694, 2 Cal. Daily Op. Serv. 9838, 2002 Daily Journal D.A.R. 11,017, *rev. granted*, 63 P.3d 214, 130 Cal.Rptr.2d 655 (*No. S111188* 1/15/2003), *case dismissed and remanded* (11/12/2003).

Malicious prosecution
Malpractice

Law firm could bring malicious prosecution claim against lawyer for a corporation that had filed a malpractice action against law firm, where there was lack of probable cause for malpractice claim (i.e., appellate court in related case had held firm did not represent corporation and trial court's disqualification of law firm in related case without giving a reason for the disqualification had not provided probable cause for the malpractice claim), but there was malice (lawyer's knowledge that law firm had not represented corporation was prima facie evidence of malice).

2,022 Ranch, LLC v. Superior Court (Chicago Title Ins. Co.) (4th Dist. 12/5/2003) 113 Cal.App.4th 1377, 7 Cal.Rptr.3d 197, 3 Cal. Daily Op. Serv. 10,476, 2003 Daily Journal D.A.R. 13,213.

Attorney-client privilege
Insurance counsel
Work Product Immunity

Court holds that attorney-client privilege does not necessarily attach to documents prepared by an insurance company's claims adjuster who is engaged in a factual investigation, even if claims adjuster was also a lawyer. The court directed the trial court to review each document in camera to determine whether it was subject to either the attorney-client privilege or work product immunity.

Matter of Tenner (State Bar Ct. Rev. Dept. 5/28/2004) ___ Cal. State Bar Ct. Rptr. ___, 4 Cal. Daily Op. Serv. 4788, 2004 Daily Journal D.A.R. 6531.

Discipline
Failure to Perform Services Competently (Rule 3-110)
Failure to Communicate (Rule 3-500)
Improper Withdrawal & Failure to Return Fees and Release Client Files (Rule 3-700)
Failure to Maintain Proper Respect for Courts (Bus. & Prof. Code § 6068(b)
Moral Turpitude

Review Court recommended that lawyer be disbarred for the second time after being convicted by the hearing judge of 21 counts of misconduct in four different matters, including failure to perform services competently (Rule 3-110), failure to communicate to the client significant developments in the clients' matters (Rule 3-500), improper withdrawal & failure to return fees and release client files (Rule 3-700), and failure to maintain proper respect for courts (Bus. & Prof. Code § 6068(b), and moral turpitude. Although the hearing judge thought the lawyer's previous disbarment in 1986 should not weigh too heavily in determining the level of discipline because it was remote in time, the Review Court disagreed, citing to the fact that the conduct that led to the previous disbarment had been serious (endorsing checks without client consent and moral turpitude).

In re Truck-A-Way (E.D. Cal. 9/10/2003) 300 B.R. 31.
Disqualification
Discovery Misconduct
Court holds that conduct of Bankruptcy Trustee's lawyer in effecting a warrantless search of debtor's home and other property, and seizing and reviewing document boxes identified as containing documents from debtor's lawyer, warranted Trustee's disqualification from further participation in the case.

Tuttle v. Combined Ins. Co. (E.D.Cal. 1/17/2004) 222 F.R.D. 424, 2004 WL 1656632.
Ex parte contact with witness
Cal. Rule 5-200
Cal. Rule 5-310
Sanctions
Lawyer was ordered to *personally* pay $5,000.00 in sanctions to the court for "directly or indirectly" causing an employee of client corporation who was witness for plaintiff against the corporation to leave the jurisdiction and be unavailable to testify at trial, and then misleading the court as to the employee's whereabouts, in violation of rules 5-200 and 5-310. The court rejected out of hand counsel's argument that as counsel for the corporation, he was also in an attorney-client relationship with the employee witness.

Vega v. Jones, Day, Reavis & Pogue (2d Dist. 8/2/2004) ___ Cal.App.4th ___, 17 Cal.Rptr.3d 26, 4 Cal. Daily Op. Serv. 7000, 2004 Daily Journal D.A.R. 9475, 2004 WL 1719279.
Law Firm
Fraud
The Court of Appeal allowed a fraud claim by a shareholder of a corporation that had merged to proceed against the law firm that represented the acquiring corporation on the grounds of intentional concealment or suppression of facts where the law firm was alleged to have concealed the fact that the transaction's financing involved "toxic" stock under which the investors received convertible preferred stock that seriously diluted the shares of all other stockholders of the acquiring corporation, including the plaintiff who had transferred his shares in the target corporation for the relatively worthless shares of the merged corporation. The court noted that the law firm, which knew that "'toxic' stock financing is a 'desperate and last resort of financing for a struggling company' and that 95 percent of companies who engage in such financing end up in bankruptcy," and that, although it had prepared a two-page disclosure schedule that disclosed the existence of the "toxic" stock financing, it never provided plaintiff, the target corporation or plaintiff's lawyers with the schedule, allegedly knowing that full disclosure would have "killed the acquisition," without which the acquiring corporation could not have survived. The court distinguished ***B.L.M. v. Sabo & Deitsch*** (1997) 55 Cal.App.4th 823, 64 Cal.Rptr.2d 335, because case involved allegations of *negligent* misrepresentation based on an *opinion* the defendant lawyers had rendered, and was an attempt by the plaintiff in that case to extend a lawyer's professional liability to a third party that was not justified in relying on the lawyer's misrepresentations. The present case, however, involved allegations of an *intentional* concealment of a *material* fact. The court reversed the trial court, which had sustained the law firm's demurrer.

Venture Law Group v. Superior Court (Singhania) (6th Dist. 4/7/2004) 118 Cal.App.4th 96, 12 Cal.Rptr.3d 656.
Attorney-client Privilege
Successor Corporation
Attorney-client privilege belongs to the successor corporation in a merger and, absent waiver of the privilege by the successor, the former managers of the merged corporation who had been sued by disgruntled shareholders of the merged corporation, would not be able to depose the attorney who represented the merged corporation, even though they had asserted an advice of counsel defense.
See also ***HLC Properties Ltd. v. Superior Court*** **(Cal.App. 2003),** ***rev. granted*** **(12/23/2003),** *above.*

Viner v. Sweet (6/23/2003) 30 Cal.4th 1232, 70 P.3d 1046, 135 Cal.Rptr.2d 629.
Malpractice
Transactional practice
Proof of case
In a unanimous opinion, the California Supreme Court held that the "case-within-case" approach required to prove litigation malpractice also applies to allegation of transactional malpractice, disapproving ***California State Auto. Assn. Inter-Ins. Bureau v. Parichan, Renberg, Crossman & Harvey***, 84 Cal.App.4th 702, 101 Cal.Rptr.2d 72. To prevail, a plaintiff alleging transactional malpractice will have to show that "but for" the alleged malpractice, it is more likely than not that plaintiff would have received a better result. The trial court had instructed the jury that the alleged malpractice need only be a "substantial factor" in causing the harm.

Viner v. Sweet (2d Dist. 4/24/2004) 117 Cal.App.4th 1218, 12 Cal.Rptr.3d 533 [ON REMAND]
Malpractice
Transactional practice
Proof of Case
On remand, a sharply-divided Court of Appeal held that the plaintiffs were not entitled to a second bit of the apple, and so would not be allowed to attempt to reprove their case under a "but for" standard, as they had already been afforded ample opportunity to do so in the previous trial. The court noted that "the requirement of proof of but for causation in any legal malpractice case was relatively settled at the time of trial," and elaborated: "there is no suggestion in the record that the court ruled on the causation issue prior to the close of evidence; and the Viners were plainly on notice of the potential importance of evidence relating to but for causation from the outset of the trial. How causation could be proved was addressed not only in dueling proposed jury instructions but also in a motion for directed verdict filed by [defendant law firm] prior to the close of evidence. The Viners' inability to prove but for causation was also the focus of much of [defendant law firm's] evidentiary presentation and closing argument." Accordingly, defendant lawyers would be entitled to entry of judgment on remand.

Zamos v. Stroud (Cal. 4/19/2004), *mod*. (6/9/2004) 32 Cal.4th 958, 87 P.3d 802, 12 Cal.Rptr.3d 54.

Malicious prosecution

Anti-S.L.A.P.P. statute

The Supreme Court affirmed the court of appeal, holding that lawyer may be held liable for malicious prosecution for maintaining an action after it becomes apparent there is no basis for the action – even if lawyer had a good basis for believing it had merit when the lawyer filed the action. Disapproving ***Swat-Fame, Inc. v. Goldstein***, 101 Cal.App.4th 613, 124 Cal.Rptr.2d 556, ***Vanzant v. DaimlerChrysler Corp.***, 96 Cal.App.4th 1283, 118 Cal.Rptr.2d 48, and ***Morrison v. Rudolph***, 103 Cal.App.4th 506, 126 Cal.Rptr.2d 747.

II. RECENT ETHICS OPINIONS

A. CALIFORNIA STATE BAR FORMAL ETHICS OPINIONS

1. California State Bar Ethics Opn. 2003-163 – Attorney-client relationship, Duty of Confidentiality, Conflicts of Interest, Corporations, Duty of Loyalty

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2003-163

ISSUE: What are the duties of a lawyer who represents a corporation as its outside counsel, and who also simultaneously represents an officer of that corporation individually, when the lawyer receives information that creates a conflict between the lawyer's duties to the two clients?

DIGEST: When an outside lawyer represents a corporation and also simultaneously represents a corporate constituent in an unrelated personal matter, information which the lawyer learns from the constituent or as a result of representing the constituent is a client secret of the constituent if the constituent asks the lawyer to keep the information confidential or if the information is embarrassing or detrimental to the constituent. The lawyer may not provide advice to the corporation on a matter which is adverse to the constituent, and substantially related to the lawyer's work for the constituent, without the constituent's consent.

Even if the lawyer owes no duty of confidentiality to the constituent, the lawyer owes a duty of undivided loyalty to the constituent while the constituent is a current client. That duty prevents the lawyer from advising the corporation adversely to the officer, without the officer's consent, while the officer is the lawyer's current client.

If the lawyer's duty of competent representation of the corporation requires the lawyer to provide advice to the corporation adverse to the constituent, then the lawyer must withdraw if providing such advice to the corporation would violate the lawyer's duties to the constituent. The lawyer is not required to withdraw as to any other matter. The lawyer must withdraw in a manner that does not violate her duties to the corporation or to the officer.

AUTHORITIES INTERPRETED: Rules 3-110, 3-310, 3-500, and 3-700 of the Rules of Professional Conduct of the State Bar of California.
Business and Professions Code section 6068, subdivision (e).

STATEMENT OF FACTS

Lawyer serves as an outside attorney for a closely held corporation, Corp. Lawyer handles most of Corp's general legal matters, including alerting Corp to, and advising Corp about, potential liabilities. Corp has been run for some time by its two principal shareholders, Prexy, the President, and CFO, the Chief Financial Officer, who are old friends. Lawyer has represented CFO on a number of personal matters not related to Corp. Some of CFO's personal matters remain pending, including the purchase and sale of real and personal property, a reckless driving charge, and family matters. Most recently, CFO consulted Lawyer on a modification of a support matter relating to his former marriage, and this support issue remains open. Lawyer does not represent Corp and CFO as joint clients on any single matter.[1/]

[1/] Accordingly, we need not address the rules governing representation of joint clients in the same matter.

Lawyer learns that CFO might have sexually harassed several Corp employees. We are asked to consider Lawyer's duties if she learns of the possible sexual harassment in either of two ways: (1) CFO goes to Lawyer's office and asks to speak to Lawyer privately on a "personal matter," Lawyer asks CFO to continue, and CFO admits incidents of sexual harassment; or (2) Prexy tells Lawyer that Prexy has learned of a particular incident of sexual harassment by CFO, plus rumors of several others, and needs Lawyer's advice concerning what Corp should do.

Lawyer has no written engagement agreement with CFO or with Corp and has not excluded from the scope of either lawyer-client relationship matters relating to CFO's employment with Corp.

DISCUSSION

I. Lawyer's Duty Where CFO Provides Information

The facts state that both Corp and CFO are current clients of Lawyer on different matters. If CFO informs Lawyer privately about CFO's harassment, with the objectively reasonable belief that CFO is speaking to Lawyer as CFO's personal lawyer, the information CFO conveys is confidential and cannot be revealed without CFO's approval. (Bus. & Prof. Code, § 6068, subd. (e).)[2/] Client secrets, which section 6068, subdivision (e) requires an attorney to preserve, are not limited to information that is within the scope of the attorney-client privilege. That is, client secrets are not limited only to information communicated confidentially by a client to the client's lawyer for the purpose of obtaining legal advice. (See Evid. Code, § 952, which defines "confidential communication" for purposes of the attorney-client privilege.) In addition to confidential information that a client provides to his lawyer, a "client secret" also includes information that the lawyer gains as a result of the professional relationship and which the client has requested to be kept confidential or the disclosure of which would be embarrassing or would likely be detrimental to the client. (See Cal. State Bar Formal Opns. Nos. 1996-146, 1986-87, 1981-58, and 1980-52 and L.A. Cty. Bar Opns. Nos. 456 (1990), 436 (1985), and 386 (1980).)

The existing professional relationship between Lawyer and CFO might well have given CFO a reasonable basis for believing that he was speaking to Lawyer in her professional capacity and in confidence. (See *Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39 [154 Cal.Rptr. 22]; see also *Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126 [275 Cal.Rptr. 802].) In that event, Lawyer would be obligated to preserve the confidentiality of CFO's statements to Lawyer even if Lawyer did not subjectively intend to provide legal advice to CFO when CFO asked to discuss a "personal" matter with Lawyer. On the other hand, if the course of dealing between Lawyer and CFO would not permit CFO to believe reasonably that his "personal" discussion with Lawyer was in fact an attorney-client consultation, then Lawyer would not be obligated as a matter of legal ethics to maintain that information in confidence. (See, e.g., *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456] [attorney disclaimed attorney-client relationship in advance of discussion].)

Assuming that CFO did have an objectively reasonable basis for believing that CFO was speaking to Lawyer in confidence as CFO's personal attorney, then Lawyer's duty to preserve CFO's secrets would prevent Lawyer from revealing any information about the sexual harassment that Lawyer learned directly from CFO or as a result of her representation of CFO. Such information would be embarrassing or detrimental to CFO. This restriction means that Lawyer could not reveal CFO's admitted harassment to anyone affiliated with Corp, including Corp's Board or Prexy.

Lawyer's duty to preserve CFO's secrets could thus impede Lawyer's ability to discharge her duties to Corp. Lawyer has a duty to inform Corp of significant developments related to Lawyer's representation of Corp under rule 3-500 of the California Rules of Professional Conduct[3/] and Business and Professions Code section 6068, subdivision (m). Further, rule 3-110(A) imposes on Lawyer a duty to represent Corp competently. Competent representation requires the diligence, learning and skill "reasonably necessary for the performance of . . . [legal] service." (Rule 3-110(B).) Here, CFO's alleged sexual harassment, which could result in liability to Corp, appears to fall within the scope of Lawyer's representation of Corp, which includes alerting Corp to, and advising Corp about, potential liabilities. Thus, Lawyer's duties to Corp probably require Lawyer to disclose CFO's alleged sexual harassment to Corp and would conflict with any duty Lawyer owed to CFO to maintain information about the harassment in confidence. Unless CFO were to give

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[2/] California Business and Professions Code section 6068, subdivision (e) requires Lawyer to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

[3/] All further rule references are to the Rules of Professional Conduct of the State Bar of California.

Lawyer consent to disclose CFO's admission of harassment to Corp, Lawyer would have a conflict of interest in continuing to represent Corp concerning matters which encompass CFO's harassment. (See Cal. State Bar Formal Opn. No. 1995-141 [a conflict of interest occurs when a lawyer's ability to fulfill basic duties to a client is impeded by the lawyer's own interests extraneous to the lawyer-client relationship or by conflicting duties that the lawyer owes to another present or former client].)

If CFO denies Lawyer permission to share with Corp the information that CFO has given to Lawyer, then Lawyer must withdraw from representing Corp on those matters to which the confidential information given to the lawyer by CFO is pertinent. Rule 3-700(B)(2) requires withdrawal where "[t]he member knows or should know that continued employment will result in a violation of these rules or of the State Bar Act." Lawyer's inability to fulfill simultaneously her duties to CFO and Corp with respect to the sexual harassment would result in a violation of the duties stated in the rules and the State Bar Act and would therefore trigger Lawyer's duty to withdraw, at least from those matters where his duties to CFO and Corp conflict.

Lawyer may not need to withdraw from representing Corp altogether if she can fashion a more limited withdrawal that does not imperil CFO's confidentiality. In making such a limited withdrawal, however, Lawyer must be careful to avoid an implicit disclosure of information about CFO which Lawyer otherwise could not disclose expressly without violating her duty of confidentiality to CFO. Thus, Lawyer withdrawing only from representation concerning the terms and conditions of CFO's employment might not be the appropriate course of action as it may result in an implicit disclosure that CFO has engaged in conduct that may injure Corp. In any withdrawal, Lawyer should take care to take "reasonable steps to avoid reasonably foreseeable prejudice" to Corp's legal rights. (Rule 3-700(A)(2).)

II. Duty of Lawyer Where Prexy Provides Information

We now turn to the second variant of the hypothetical, which posits that Lawyer learns of CFO's alleged harassment from Prexy, the President of Corp, not from CFO. Under these facts, Lawyer learns the information about CFO as a result of Lawyer's representation of Corp, not CFO. Thus, Lawyer is not obligated to treat the information as CFO's client secret. Nevertheless, Lawyer still faces a potential conflict between Lawyer's duties to Corp and Lawyer's duty of loyalty to CFO. An attorney owes a duty of loyalty "'to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent. . . .'" (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 548 [28 Cal.Rptr.2d 617], quoting *Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788].) If Lawyer were to provide advice to Corp about how to react to the allegations that CFO has committed sexual harassment, then Lawyer will be giving legal advice to Corp that is adverse to CFO. Such advice would almost certainly involve potential adverse employment consequences to CFO, as well as civil liability.

Lawyer may not cure the conflict by unilaterally dropping CFO as a client. (*Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1056-1057 [8 Cal.Rptr.2d 228].) Lawyer may, on the other hand, ask CFO to waive the duty of loyalty and permit Lawyer to advise Corp on the harassment topic. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537].) Before seeking CFO's consent, however, Lawyer must consider whether Lawyer would thereby violate her duty of confidentiality to Corp. Here, for instance, if Prexy had indicated a desire to handle the matter confidentially, Lawyer would not be free to announce Lawyer's knowledge of the allegations to CFO without Corp's consent.

If Corp will not allow Lawyer to seek CFO's consent, or if CFO declines to waive the duty of loyalty, then Lawyer must withdraw from representing Corp if Lawyer cannot advise Corp competently without violating Lawyer's duty of undivided loyalty to CFO. Lawyer is obligated to withdraw from representing Corp only to the extent necessary to resolve the conflict of interest. On the facts presented to us, we believe that Lawyer would have to withdraw from her representation of Corp to the extent that Lawyer's representation includes identifying and assessing potential claims against Corp arising from CFO's conduct.

If CFO consents to Lawyer representing Corp concerning CFO's alleged harassment, then Lawyer must consider whether she is capable of advising Corp on the harassment topic competently without regard to her professional or other relationship with CFO. If Lawyer does not believe she can provide advice to Corp about CFO based on independent and objective professional judgment, then Lawyer should not undertake to provide such advice. Lawyer should also consult Rule 3-310(B), which requires written disclosure of certain personal relationships and interests. Here, Lawyer likely has a professional relationship with CFO which must be disclosed in writing to Corp because CFO is a party to the matter on which Lawyer will advise Corp. (Rule 3-310(B)(1).) In addition, Lawyer may have a professional relationship with

a person (CFO) likely to be substantially affected by the outcome of Lawyer's advice on CFO's alleged harassment, thus triggering written disclosure to Corp under Rule 3-310(B)(3).

III. Prevention of Conflicts in Corporate Practice

Outside corporate counsel sometimes are requested to perform legal services for corporate constituents, especially corporate directors, officers, and managers. Such personal legal services to corporate constituents usually can be provided without any conflict or violation of the Rules of Professional Conduct. However, on occasion a lawyer's representation of a corporation and certain corporate constituents on unrelated matters can lead to potential or actual conflicts of interests, as demonstrated by the factual scenario we analyze above. Lawyers who represent both a corporation and certain constituents on unrelated matters should be alert for such situations as they arise.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

2. California State Bar Ethics Opn. 2003-164 – Attorney-client relationship, Duty of Confidentiality, Radio Call-in Show

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2003-164

ISSUE: May an attorney-client relationship be formed with an attorney who answers specific legal questions posed by persons with whom the attorney has not previously established an attorney-client relationship on a radio call-in show or other similar format?

DIGEST: The context of a radio call-in show or other similar format is unlikely to support a reasonable belief by the caller that the attorney fielding questions is agreeing implicitly to act as the caller's attorney or to assume any of the duties that flow from an attorney-client relationship.

AUTHORITIES INTERPRETED: Rules 3-110, 3-300 and 3-310 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code section 6068, subdivision (e).

Evidence Code sections 951, 952.

STATEMENT OF FACTS

As part of an effort to recognize Law Day, a local radio station invites an attorney (Attorney) to answer legal questions posed by the station's listeners. Attorney agrees to appear without compensation to answer questions "live and on the air." During the special radio talk show commemorating Law Day, listeners ask questions involving a variety of legal topics. Several times during the radio program it is announced on the air that all calls are being screened by the radio station's staff, that callers should not expect their conversations with Attorney or the radio staff to be held in confidence, and that the legal information provided "on the air" is not intended to be a substitute for callers hiring their own lawyers to advise them about personal legal matters. Callers do not provide their full names on the air. They are pre-screened by the radio station's non-attorney staff, in part to identify and showcase matters of general interest to the listening audience. The screeners also announce to each caller that she or he should not expect confidentiality in the discussion with Attorney. Despite the screener's confidentiality disclaimer and the periodic announcements during the course of the program, specific information about the caller's identity and legal issue is sometimes disclosed to the screener.

During the show, a caller poses a question involving a landlord-tenant matter. Relying on law school training and information garnered over the years, Attorney provides the caller with a generalized answer rather than one directly addressing the caller's specific question. Following the answer, Attorney points out that the question is outside his area of expertise, and that the caller should select and consult an attorney who practices in the field of landlord-tenant law.

In response to another caller's question about a probate matter, Attorney again provides a generalized answer. The answer provided, however, is incorrect and misstates the law. However, Attorney again cautions the caller that the question is outside his area of legal expertise and suggests that the caller select and consult with an attorney who practices in the area of probate law.

In both situations, Attorney answers questions from callers with whom he has not previously established an attorney-client relationship. In the following discussion, we consider some of the implications and potential professional responsibility issues involved in the aforementioned situations.

DISCUSSION

I. Background

The courts and the legal profession have acknowledged that, despite the number of practicing attorneys, a large segment of the population lacks access to competent, affordable legal services. Notwithstanding efforts of legal services organizations and individual attorneys that provide *pro bono* representation to thousands of individuals, this problem persists. Partly in response to the need for increased access to competent legal counsel, a number of methods have emerged for providing specific legal information to greater numbers of people about their legal rights and responsibilities. For example, it is now common for attorneys to answer legal questions through radio call-in programs, newspaper and magazine columns, and other similar formats.[1/]

While the questions posed in such formats sometimes request information about general, abstract principles of law, the inquirers often disclose specific facts and request specific responses. The Committee has been asked, by reference to the factual setting presented above, to provide an opinion about the potential for forming an attorney-client relationship or assuming any of the professional duties owed a client when a lawyer participates in answering questions through some form of public media.

II. Formation of an attorney-client relationship

In the present situation, although the callers may be speaking to Attorney for the purpose of securing legal advice about a specific legal problem, they are doing so as part of a call-in radio program. As discussed below, the Committee believes that context does not provide a basis for a caller to form a reasonable belief that an attorney-client relationship has been formed, expressly or implicitly, with Attorney. In particular, the callers cannot have any reasonable expectation that Attorney will keep confidential information that the callers have chosen to transmit in a public forum and advice or information which the callers have elected to receive through that same public forum.

An attorney-client relationship can be created by express or implied agreement. Except when created by court appointment, the attorney-client relationship may be found to exist based on the intent and conduct of the parties and the reasonable expectations of the potential client. (See, e.g., *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 281, fn. 1 [36 Cal.Rptr.2d 537] [discussing the factual nature of determining whether an attorney-client relationship has been formed]; *Hecht v. Superior Court* (1987) 192 Cal.App.3d 560, 565 [237 Cal.Rptr. 528] [the determination that an attorney-client relationship exists ultimately is based on the objective evidence of the parties' conduct]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954 [226 Cal.Rptr. 532] [absent some objective evidence of an agreement to represent plaintiffs, it is not sufficient that plaintiffs "thought" defendant was their attorney].)

[1/] There are many other situations in which attorneys provide information on legal topics to the public including, for example, articles and texts directed to non-lawyer audiences and public commentary on legal issues. These activities are beyond the scope of this opinion, which focuses on an attorney's responses to questions posed to the attorney in a public forum.

On the facts presented to us, Attorney has not agreed explicitly to form an attorney-client relationship with the callers. Hence, any attorney-client relationship would have to be implied from the circumstances. This question is of vital importance to Attorney because if Attorney were to form an implied-in-fact attorney-client relationship with a caller, then Attorney would be obligated to comply with all of the professional responsibilities owed to a client. Among the responsibilities ordinarily owed a client are confidentiality, loyalty, and competency.[2/] The fact that the attorney does not charge a fee or receive consideration for services provided does not relieve an attorney of his or her professional responsibilities if the totality of the circumstances indicates an attorney-client relationship has been formed.[3/]

In California State Bar Formal Opn. No. 2003-161 at pages 3-4, we noted that the courts have looked to a number of factors in assessing whether the totality of circumstances warrants concluding that an attorney-client relationship has been formed absent express agreement of the attorney and client. Those factors include:

- Whether the attorney volunteered his or her services to a prospective client. (*Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39 [154 Cal.Rptr. 22]);

- Whether the attorney agreed to investigate a case and provide legal advice to a prospective client about the possible merits of the case. (*Miller v. Metzinger* (1979) 91 Cal.App.3d 31 [154 Cal.Rptr. 22]);

- Whether the attorney previously represented the individual, particularly where the representation occurred over a lengthy period of time or in several matters, or occurred without an express agreement or otherwise in circumstances similar to those of the matter in question. (Cf. *IBM Corp. v. Levin* (3d Cir. 1978) 579 F.2d 271, 281 [law firm that had provided labor law advice to corporation for several years held to be in an ongoing attorney-client relationship with corporation for purposes of disqualification motion, even though firm provided legal services on a fee for services basis rather than under a retainer arrangement and was not representing the corporation at the time of the motion].);

- Whether the individual sought legal advice from the attorney in the matter in question and the attorney provided advice. (See *Beery v. State Bar* (1987) 43 Cal.3d 802, 811 [239 Cal.Rptr. 121]);

- Whether the individual paid fees or other consideration to the attorney in connection with the matter in question. (See *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1403 [82 Cal.Rptr.2d 326]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532]);

- Whether the individual consulted the attorney in confidence. (See *In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556 [20 Cal.Rptr.2d 132];

- Whether the individual reasonably believes that he or she is consulting a lawyer in a professional capacity. (See *Westinghouse Electric Corp. v. Kerr-McGee Corp.* (7th Cir. 1978) 580 F.2d 1311, 1319).

Again, the inquiry is based on the totality of the circumstances. No single factor is necessarily dispositive.[4/]

[2/] (See Business and Professions Code section 6068, subdivision (e); Rules 3-110, 3-300 and 3-310 of the Rules of Professional Conduct of the State Bar of California.)

[3/] An attorney's failure to provide agreed-upon services to a *pro bono* client supported the imposition of discipline. (*Segal v. State Bar* (1988) 44 Cal.3d 1077 [245 Cal.Rptr. 404].)

[4/] Further, in evaluating whether an attorney may have assumed any of the duties, including confidentiality, that an attorney ordinarily owes a client, courts look at the context in which the consultation between the attorney and the person seeking legal advice took place. For example, in considering whether a person's communications with an attorney should subject the attorney to disqualification, the Supreme Court has held that the primary concern is whether and to what extent the attorney acquired material confidential information. *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. The Court in *SpeeDee Oil* discussed *In re Marriage of Zimmerman, supra,* 16 Cal.App.4th 556. *Zimmerman* had involved a person's communications to a lawyer in the context of a preliminary consultation. The *SpeeDee Oil* court pointed out that the party seeking disqualification in

Here, one can point to some of the facts in our hypothetical to support concluding that the Attorney could be forming attorney-client relationships with callers to the radio show by having invited them to ask questions calling for legal knowledge and judgment and by agreeing to provide answers to them. For example, (1) the callers are provided with an opportunity to pose "legal questions" to Attorney; (2) the callers take advantage of that opportunity by calling in to the radio program and, in some cases, give specific information about their identity and legal problems to the screener, despite the requests not do so; (3) the callers go on the air and present personal legal problems to Attorney; (4) Attorney answers the questions posed. Legal advice has been defined as that which "require[s] the exercise of legal judgment beyond the knowledge and capacity of the lay person." (*In re Anderson* (Bankr.S.D.Cal. 1987) 79 B.R. 482, 485.) Cases suggest that legal advice includes making a recommendation about a specific course of action to follow.[5/] In addition, courts ask whether the attorney may have volunteered his or her services to the purported client. (*Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39 [154 Cal.Rptr. 22]).

On the other hand, the following facts from the hypothetical weigh against the formation of an attorney-client relationship: (1) It is not reasonable for a person to believe that participating in a radio program by posing questions to someone identified as an attorney is an acceptable manner of seeking legal advice, in contrast to the normal methods of engaging an attorney (such as phoning the attorney's office or visiting the attorney in his or her office for a consultation); (2) the public nature of the broadcast makes it impossible for the caller to have any reasonable expectation of confidentiality, which is ordinarily an essential element of an implied-in-fact attorney-client relationship; (3) periodically during the course of the program there are announcements that callers cannot expect any confidentiality; (4) the screener tells each caller, prior to receiving any facts about the caller, that the caller should not expect any confidentiality or privacy in conversing on the air with Attorney; (5) periodic on-the-air announcements state that the radio program is "not intended to be a substitute for callers hiring their own lawyers" for legal advice regarding their specific problem; (6) consistent with the periodic announcements, and the time limitations imposed by the radio call-in format, Attorney provides answers that are fairly generalized and designed to maximize the educational value of the caller's question as a tool for providing general legal information to the radio audience as a whole; (7) the callers are repeatedly told they should seek out a more knowledgeable attorney to advise them on particular matters, conveying Attorney's intent not to represent the callers; and (8) the callers are not charged and Attorney is not paid a legal fee.[6/]

On balance, there is no reasonable basis for callers to believe Attorney is undertaking to represent the caller's specific interests. (Please see California State Bar Formal Opn. No. 2003-161, *supra*, for a complete discussion of the foregoing factors that are considered in determining whether an implied attorney-client relationship has been formed. We do not intend our more concise application of the same principles in this opinion to alter the more exhaustive analysis set forth in California State Bar Formal Opn. No. 2003-161.)

Zimmerman (the wife) failed to show that attorney Gack [the partner of the husband's lawyer] had acquired confidential information during the preliminary consultation with the wife. The court noted that if Gack [the partner of the husband's lawyer] provided any representation at all, "it was clearly work of a preliminary and peripheral nature. [Citation.] . . . He performed no work for [wife, instead referring] her to an attorney with 'domestic expertise.'" Id. at 564 - 65, 20 Cal.Rptr.2d at 137-38. Because of the partner's minimal involvement in the wife's case, the court determined "he obviously was not called upon to formulate a legal strategy and . . . could not have gained detailed knowledge of the pertinent facts and legal principles." Id. at 564, 20 Cal.Rptr.2d at 137. On that basis, the court noted the *Zimmerman* court properly refused to disqualify the husband's lawyer.

[5/] For example, determining when a debtor should file a bankruptcy petition was deemed to be "legal advice." (*In re Gabrielson* (Bankr.D.Ariz. 1998) 217 B.R. 819, 824.) See also, *In re Glad* (Bankr.9th Cir. 1989) 98 B.R. 976, 978 [advising a debtor to file a chapter 11 bankruptcy petition]; and *In re Kaitangian* (Bankr.S.D.Cal. 1998) 218 B.R. 102, 112 [explaining or discussing the impact of a bankruptcy filing on the dischargeability of debts].

[6/] One factor bearing on the formation of an attorney-client relationship is the payment of legal fees. (*Strasbourger Pearson Tulcin Wolff, Inc. v. Wiz Technology, Inc.* (1999) 69 Cal App 4th 1399, 1403 [82 Cal.Rptr.2d 326]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532, 535].) Thus, if Attorney received compensation to provide such advice, the payment might constitute an additional, although not necessarily a conclusive factor to consider in determining whether an attorney-client relationship had been formed with the caller. Similarly, the nonpayment of fees or the absence of a written fee agreement would not necessarily require a conclusion that an attorney-client relationship was *not* formed.

As already noted at the beginning of this Discussion, it is not reasonable for a person to believe that discussing legal issues with an attorney creates an attorney-client relationship if others are present, if they are able to hear the entire discussion, and if they are not present to further the interests of the person in the discussion (see Evid. Code, §952). We emphasize, however, that the issue as to the existence of an implied-in-fact attorney-client relationship is one of fact, resolved on the basis of the totality of the circumstances and from the standpoint of the reasonable expectations of the person dealing with the attorney.[7/] An attorney can avoid the inadvertent creation of an attorney-client relationship by words, conduct, or other explicit action. (*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456] [attorney told defendant that he could not represent the defendant in advance of discussion of defendant's legal problem]; see also *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532, 535].)[8/]

Although we conclude there is no reasonable basis for a caller to believe that an attorney-client relationship is formed through the call-in show, it is important that Attorney keep in mind the limitations of the call-in format and the Attorney's own expertise. Because the purpose of the call-in show is to provide legal information to the public at large, thus improving the accessibility of the law to the public, it serves little purpose for Attorney, as he has done here, to disseminate information about which he cannot be confident. Attorneys who answer questions on a radio call-in show or other similar format should avoid answering questions about areas of law with which they are unfamiliar.

CONCLUSION

Both attorneys and the public benefit from the dissemination of information about legal rights and responsibilities, which contributes to greater access to the justice system. Attorneys providing that service to the public should, however, keep in mind the limitations of the format they use, especially when providing information about complex topics and topics outside an attorney's area of legal expertise.

[7/] In this regard, attorneys need to be sensitive to the possibility that someone might believe that an attorney-client relationship has been formed with the attorney, even if that belief is mistaken. In *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [228 Cal.Rptr. 499], the California Supreme Court disciplined an attorney for, among other things, the attorney's failure to communicate with the stepson of the attorney's purported client where, under the facts, the stepson reasonably believed he was a client of attorney. The court noted that at a minimum, the attorney had a duty to advise the stepson he was not a client.

[8/] Even when an individual engages in an initial consultation with an attorney, but no attorney-client relationship is formed, the attorney can nonetheless take on a duty to keep confidential the information divulged during the consultation. Evidence Code section 951 broadly defines "client" for purposes of the attorney-client privilege as "a person or entity who, directly or through an authorized representative, consults a lawyer for the purposes of retaining the lawyer or securing legal service or advice from him in his professional capacity." Evidence Code section 952 defines "confidential communication between client and lawyer" to mean: "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, *discloses the information to no third persons other than those who are present to further the interest of the client in the consultation . . . .*" (Emphasis added.) Thus, an attorney might owe a duty of confidentiality to a person consulting the attorney for purposes of securing legal services or advice if, by words or conduct, the attorney manifests a willingness to engage in a preliminary consultation for the purpose of providing legal advice or services, and confidential information was communicated to Lawyer. (Cf. *Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39-40 [154 Cal.Rptr. 22], quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp.* (7th Cir. 1978) 580 F.2d 1311, 1319 ("[T]he fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result.") See also California State Bar Formal Opn. No. 2003-161 for a comprehensive consideration of this issue.)

Under the specific facts presented here, however, even if a caller called in for the purpose of securing legal advice about a specific legal problem, the radio program's format could not create a reasonable expectation that the caller is engaging in a confidential consultation with Attorney because the callers are told that their communications to Attorney and Attorneys responses are all broadcast to the public. In our opinion it is not reasonable to believe that the discussion of legal issues with an attorney has imposed on the attorney a duty of confidentiality if others are present, if they are able to hear the entire discussion, *and* if they are not present to further the interests of the potential client in the discussion (see Evid. Code, §§ 951, 952).

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its board of governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

3. California State Bar Ethics Opn. 2004-165 – Contract Lawyers, Attorney-client relationship, Duty of Confidentiality, Duty of Loyalty, Duty of Competence, Communication with Client, Conflicts of Interest, Attorney Fees, Division of Fees

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2004-165**

ISSUE:

1. What are the ethical responsibilities of a member of the California State Bar who uses outside contract lawyers to make appearances on behalf of the member's clients?

2. What are the ethical responsibilities of the outside contract lawyer who makes the appearances?

DIGEST:

1. To comply with his or her ethical responsibilities, a member of the California State Bar who uses an outside contract lawyer to make appearances on behalf of the member's client must disclose to his client the fact of the arrangement between the member and the outside lawyer when the use of the outside lawyer constitutes a significant development in the matter. Whether the use of the outside lawyer constitutes a significant development will depend upon the circumstances in each situation. If, at the outset of the engagement, the member anticipates using outside lawyers to make appearances on behalf of the member's client, the member should address the issue in the written fee agreement with the client. If the member charges the outside lawyer's fees and costs to the client as a disbursement, the member must state the client's obligations for those charges in the written fee agreement. In addition, the member remains responsible to the client, which includes responsibility for competently supervising the outside lawyer. Finally, the member must comply with the ethical rules concerning competence, confidentiality, advertising, and conflicts of interest that apply to his or her role in any such arrangement.

2. Like the member who uses an outside contract lawyer to make appearances, the outside contract lawyer must comply with the ethical rules concerning competence, confidentiality, advertising, and conflicts of interest that apply to his or her role in any such arrangement.

AUTHORITIES INTERPRETED:

Rules 1-400, 2-200, 3-110, 3-310, and 3-500 of the Rules of Professional Conduct of the State Bar of California.
Business and Professions Code sections 6068 (e), 6068 (m), 6147, and 6148.

STATEMENT OF FACTS

Lawyer represents a number of clients in various litigation matters. Court Appearance Service ("CAS") is a service, operated by lawyers, which provides independent attorneys to law firms and sole practitioners on a contract basis. Lawyer has decided to use a CAS attorney to appear for Lawyer's clients in law and motion hearings, status

conferences, depositions, and other matters. None of CAS's attorneys are members of Lawyer's law firm.[1/] CAS charges an hourly fee for the services of its attorneys who make such appearances.

CAS advertises its services with advertisements in newspapers and magazines directed to the legal profession, with flyers handed out at bar association meetings, with telephone directory advertisements, and by other means. The advertisements contain truthful information about the state-wide, 24-hour availability of the firm, the basis on which it charges for its services, its telephone number, and its e-mail address. The advertisements state that CAS attorneys make all types of court appearances, including motions and trials, and also will attend depositions and arbitrations. The advertisements also disclaim the existence of any attorney-client relationship between CAS or the lawyers whose services it provides, and the clients of the lawyers and law firms that hire CAS to provide legal services for those clients.

DISCUSSION

A. Lawyer's Ethical Duties

1. Lawyer's Duty of Competence

Rule 3-110(A)[2/] states: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."[3/] Lawyer's satisfaction of this duty will be measured not just by his own performance, but also by the adequacy of Lawyer's supervision of the CAS lawyer; Lawyer's decision to delegate a task does not delegate his own duty of competent representation. As the discussion to rule 3-110 points out: "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents." Thus, even if Lawyer is not making the appearance, he still has a duty to supervise competently the CAS lawyer who is appearing in his stead.

What constitutes competence depends upon the facts. For example, Lawyer may retain CAS on short notice. Indeed, CAS advertises its ability to cover "emergencies" where the hiring lawyer learns at the last moment that he or she cannot make a particular hearing or appearance. This could lead to situations in which the CAS lawyer making the appearance does not have the time to learn what he or she may need to know to perform competently for that appearance. Similar concerns may arise if, in a hearing, the court addresses issues or matters which the CAS lawyer is not prepared to handle, or an outside lawyer is unable to perform other legal services competently.

At a minimum, Lawyer must adequately prepare the CAS lawyer for the appearance and the CAS lawyer must be competent to handle the appearance. In those situations where the CAS lawyer cannot be adequately prepared to represent the client in the appearance, Lawyer may not send the CAS lawyer to the appearance in his place, or permit him to provide other legal services.

The Committee recognizes that there may be some exigent circumstances in which Lawyer will have no choice other than to have another lawyer appear in his place. If, in these circumstances, the CAS lawyer making the appearance cannot be adequately prepared to represent the client competently on all the matters before the court, Lawyer should directly, or through the CAS lawyer, attempt to continue the matter or limit the scope of the appearance to matters which the CAS lawyer can be adequately prepared to handle competently.

2. Lawyer's Duty To Inform His Clients

Rule 3-500 states: "A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and

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[1/] The Committee does not address in this opinion the distribution of work within a law firm, but notes that some of the considerations stated herein may apply, depending upon the circumstances.

[2/] All rule references are to the Rules of Professional Conduct of the State Bar of California.

[3/] Rule 3-110(B) states: "For purposes of this rule 'competence' in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service."

copies of significant documents when necessary to keep the client so informed." Business and Professions Code section 6068 (m) states that an attorney has a duty "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." These authorities require Lawyer to inform his client that he has hired an outside lawyer or firm to make appearances on the client's behalf if the use of the outside lawyer or firm is a significant development.

As the Committee stated in California State Bar Formal Opn. No. 1994-138:

> "Depending on the circumstances, rule 3-500 and Business and Professions Code section 6068 (m) will generally require the law office to inform the client that an outside lawyer is involved in the client's representation if the outside lawyer's involvement is a significant development. In general, a client is entitled to know who or what entity is handling that client's representation. However, whether use of an outside lawyer constitutes a significant development for purposes of rule 3-500 and Business and Professions Code section 6068 (m) depends on the circumstances of the particular case. Relevant factors, any one of which may be sufficient to require disclosure, include the following: (i) whether responsibility for overseeing the client's matter is being changed; (ii) whether the new attorney will be performing a significant portion or aspect of the work; or (iii) whether staffing of the matter has been changed from what was specifically represented to or agreed with the client. (See L.A. Cty. Bar Assn. Formal Opn. No. 473.) The listed factors are not intended to be exhaustive, but are identified to provide guidance."[4/]

In addition to the foregoing factors, the Committee believes that the client's reasonable expectation under the circumstances also is a consideration in determining whether the presence of a CAS lawyer in place of Lawyer is a significant development. If the client reasonably expects Lawyer to be present at the appearance, the use of a CAS lawyer in his place could be a significant development that would trigger the duty to inform the client.[5/]

3. Scope and Timing of Disclosure

When a duty to inform the client arises, whenever possible Lawyer should do so before a CAS lawyer makes an appearance on behalf of Lawyer's client. When making this disclosure, the Lawyer should provide enough information to afford the client the opportunity to consider whether the client is comfortable with the proposed staffing arrangement, or whether the client would prefer an alternative arrangement.

In addition, if, at the outset of the engagement, Lawyer anticipates using CAS lawyers to appear in the client's matter, Lawyer should address the issue in the written fee agreement with the client.[6/] (See L.A. Cty. Bar Assn.

[4/] Further, at least one court in California has held that informing the court of, and obtaining the client's consent to a contract attorney's appearing on behalf of the client ordinarily will be a prerequisite to the lawyer recovering fees. (*In re Wright* (C.D.Cal. Bkrtcy. 2003) 290 B.R. 145.) The *Wright* court concluded that to recover fees for an appearance by a contract lawyer in a Chapter 13 bankruptcy case, the lawyer who hired the contract lawyer must not only inform the court in the application of the fact that the lawyer has used a contract lawyer, but also must "demonstrate that the client agreed to the use and billing rate of [the] contract attorney if the firm contemplated [his or her] use at the time that the firm was employed." *Id.* at 156. Having determined the lawyer had failed to meet the foregoing requirements, the court denied the lawyer the fees requested for work performed by the contract lawyer. *Id.* at 157.

[5/] A recent opinion of the District of Columbia Bar suggested factors to consider in determining whether the use of a temporary lawyer is a material development that should be disclosed to the client, including the following: the length of time that the temporary attorney's involvement is expected to last; any indication from the client that it desires to have a regular cadre of lawyers who will develop expertise on its matters; and the degree of responsibility of the temporary lawyer and the amount of supervision that the temporary lawyer will receive from the employing firm. District of Columbia Bar Legal Ethics Comm., Opn. 284.

[6/] Business and Professions Code sections 6147 and 6148 state when written fee agreements are required and what, at a minimum, they must contain. Section 6147, concerning contingency fee contracts, states at subsection (a)(2) that the contract shall include: "A statement as to how disbursements and costs incurred in connection with the prosecution of settlement of the claim will affect the contingency fee and the client's recovery." Section 6148, concerning cases not

Formal Opn. No. 473 ["[T]he attorney bears the responsibility to be reasonably aware of the client's expectations regarding counsel working on client's matter because the responsibility can be readily discharged by the attorney through a standard written retainer agreement or disclosure before or during the course of the representation."]; compare Cal. State Bar Formal Opn. No. 1994-138 at fn. 8 ["It would be prudent for the law firm to include the disclosure to the client in the attorney's initial retainer letter or make that disclosure as soon thereafter as the decision to hire is made."].) If Lawyer charges CAS's fees and costs to the client as a disbursement, Business and Professions Code sections 6147 and 6148 require Lawyer to state the client's obligations for those charges in the written fee agreement, if contemplated at the time of the initial fee agreement, to the same extent as other costs charged to the client.

4. The Fee Arrangement between Lawyer and CAS

Rule 2-200 requires Lawyer to meet certain requirements when dividing a fee with another lawyer who is not his partner, associate, or co-shareholder.[7/] Rule 1-100(B)(4) defines an "associate" as "an employee or fellow employee who is employed as a lawyer." To the extent that CAS or the CAS lawyer is Lawyer's employee when making the appearance, the rule's requirements will not apply. If CAS or the CAS lawyer making the appearance is not Lawyer's employee, Lawyer must comply with rule 2-200 if the compensation paid constitutes a division of the fee.

Whether CAS or its lawyers are employees of Lawyer when appearing on his behalf is a legal question which is beyond the Committee's purview. In this opinion, the Committee assumes that CAS and its lawyers are not Lawyer's employees. The question then becomes whether the hourly fee paid to CAS or the CAS lawyer is a division of Lawyer's fee.[8/]

In California State Bar Formal Opn. No. 1994-138, the Committee articulated the following three-part test for determining whether a particular arrangement constitutes a division of fees under rule 2-200: (1) The amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee. If the payment meets all three criteria, no regulated division of fees has occurred. (See also, *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].)

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coming within Section 6147 where it is reasonably foreseeable that total expense to a client including attorney fees will exceed $1,000, states at subsection (a)(1) that the contract shall include: "Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case."

[7/] Rule 2-200, in part, provides:

> (A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:
>
> (1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and
>
> (2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

[8/] Compare Los Angeles County Bar Association Formal Opn. No. 473 at fn. 5 (stating that "[t]he use of attorneys who are 'employees', whether full or part time, does not trigger the requirements of Rule 2-200(A) since such employee attorneys are 'associates' as defined in rule 1-100(B)(4)" but also stating, "[t]his opinion does not address the question of and we express no opinion as to whether an independent contractor is an employee for purposes of Rule 2-200(A) or an outside attorney."); see also Los Angeles County Bar Association Formal Opn. No. 457 (paralegal may receive occasional bonuses without implicating rule 1-320 barring sharing legal fees with non-lawyers); Los Angeles County Bar Association Formal Opn No. 467 (discussing timing of disclosure to and consent of client, under rule 2-200); and Los Angeles County Bar Association Formal Opn. No. 470 (concluding that payment of a year-end bonus to an of counsel attorney who is not a partner, associate, or shareholder of firm and whose relationship with firm consists primarily of reciprocal referral of business, is regulated by rule 2-200).

Under the facts presented, the Committee believes that a division of fees does not occur if Lawyer pays CAS or the CAS lawyer an hourly rate which meets the foregoing criteria. Billing CAS's fee as a cost, or as a separate identified entry, on Lawyer's bill to his client, also would not constitute a regulated division of fees. In addition, there would be no division of fees if CAS or the CAS lawyer bills and is paid by the client directly.[9/]

5. Lawyer's Duty To Protect Client Confidential Information

Business and Professions Code section 6068(e) states: "It is the duty of an attorney [t]o . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The scope of the protection of client confidential information under Section 6068 (e) has been liberally applied. (See *People v. Singh* (1932) 123 Cal. App. 365 [11 P.2d 73].) The duty to preserve a client's confidential information is broader than the protection afforded by the lawyer-client privilege. Confidential information for purposes of Section 6068 (e) includes any information gained in the engagement which the client does not want disclosed or the disclosure of which is likely to be embarrassing or detrimental to the client. (Cal. State Bar Formal Opn. No. 1993-133.) The duty has been applied even when the facts are already part of the public record or where there are other sources of information. (See L.A. Cty. Bar Assn. Formal Opn. Nos. 267 & 386.)

Competent representation of Lawyer's clients at the appearance may require Lawyer to reveal, and identify as confidential, his clients' confidential information to the CAS lawyer handling the appearance. While the duty to preserve a client's confidential information is broad in its scope, it nevertheless permits a lawyer to provide confidential information to members of a lawyer's staff who are involved in the client's representation when made to further the client's interests in a particular matter. (See, e.g., L.A. Cty. Bar Assn. Formal Opn. Nos. 374 & 423 [lawyers may use outside contractor data processors for client billings and the like so long as contractors informed of and agree to keep client information confidential; occasionally information may be so sensitive that it cannot be disclosed to any outside agency, and lawyer must make that determination prior to any disclosure].)

The Committee believes that similar kinds of disclosures may be made to a lawyer retained to appear in a client's matter, provided that precautions are taken to assure that the information imparted to the appearing lawyer is held in confidence.

Depending on the structure of CAS and the nature of its internal working arrangements, the attorney supplied by CAS inadvertently might disclose client secrets to CAS or to other CAS attorneys. The CAS attorney should take steps reasonably designed to avoid this. See California State Bar Formal Opn. No.1997-150.

B. CAS Lawyer's Duties

1. CAS Lawyer's Ethical Duties to Lawyer's Client

CAS's flyers and other advertising material disclaim any attorney-client relationship between CAS or its employees, and the clients of lawyers such as Lawyer. This disclaimer, however, does not by itself prevent the existence of an attorney-client relationship or the CAS attorney's assumption of ethical duties to Lawyer's client. Indeed, the facts presented here support finding an attorney-client relationship would exist between Lawyer's client and a CAS lawyer.

In general, except where a court appoints a lawyer to represent a client, a lawyer-client relationship arises by virtue of an express or implied contract. (*E.g.*, Cal. State Bar Formal Opn. No. 2003-161.) In *Responsible Citizens et al., v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 [20 Cal.Rptr.2d 756], the court suggested that "one of the most important facts involved in finding an attorney-client relationship is 'the expectation of the client based

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[9/] Notwithstanding the Committee's conclusion that rule 2-200, requiring the client's consent to a fee division, would not ordinarily apply in situations where Lawyer has used a contract appearance attorney, members should be aware that local court rules may require such consent as a prerequisite to receiving court-awarded fees. (See, e.g., *In re Wright, supra*, 290 B.R. at 155-156 (holding that a fee application must inform the court of the use of a contract lawyer, as well as demonstrate that the client has consented to the use and fee rate of the contract lawyer.)) The same court also held that a lawyer who uses a contract lawyer to make an appearance may not recover a sum over the amount paid to the contract lawyer unless the lawyer specifically requests the sum in the fee application and discloses the basis for the increased amount. *Id.* at 156.

on how the situation appears to a reasonable person in the client's position.'" (*Id.* at p. 1734.) See, *Streit v. Covington & Crowe* (2000), 82 Cal.App.4th 441 [98 Cal.Rptr.2d 193] [an attorney-client relationship is formed by an attorney making a single appearance at a court hearing at the request and in the place of the attorney of record, whether with or without compensation] and *In re Brindle* (1979) 91 Cal.App.3d 660, 671 [154 Cal.Rptr. 563, 572] [making a court appearance on a party's behalf creates a strong presumption that an attorney-client relationship has been formed]. While the existence of a lawyer-client relationship is a question of law (*Responsible Citizens*, 16 Cal.App.4th at 1733), in the Committee's opinion the appearance by a CAS attorney in a representational capacity on behalf of lawyer's client constitutes such a relationship for purposes of analyzing his or her ethical duties.[10/] By making an appearance for Lawyer's client, the CAS attorney steps into Lawyer's shoes to provide legal services to Lawyer's client, and in doing so, the CAS attorney undertakes the ethical duties that arise from an attorney-client relationship.[11/]

Moreover, regardless of whether the specific legal services provided by the CAS lawyer establishes an attorney-client relationship, the CAS disclaimer would not allow an attorney to avoid those ethical duties that can arise in the absence of an attorney-client relationship.[12/] This Committee long has recognized that the ethical duties will attach when a lawyer's relationship with a person or entity creates an expectation that the lawyer owes a duty of fidelity or when the lawyer has acquired confidential information in such a capacity. (Cal. State Bar Formal Opn. No. 1981-63; *William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1046-1047 [197 Cal.Rptr. 232] ["One who is licensed to practice as an attorney in this state must conform to the professional standards in whatever capacity he may be acting in a particular matter."].)

Among the ethical duties of the CAS lawyer, whether or not an attorney-client relationship is found to exist, are the duties to comply with the law and rules governing conflicts of interest. These conflicts rules include rule 3-310(E), which states: "A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." In *Allen v. Academic Games League of America, Inc.* (C.D. Cal. 1993) 831 F.Supp. 785, the court applied rule 3-310(E) even in the absence of a lawyer-client relationship. The court reasoned that the policies underlying the California Rules of Conduct – "to protect the public and promote respect and confidence in the legal professional"[13/] – were present, and allow a lawyer to avoid disqualification merely because the lawyer had not been a lawyer when the disqualifying events arose would undermine public confidence in the profession. (*Id.* at 788-789.) Accordingly, the court disqualified both the lawyer and his firm.

This Committee applied a similar rationale in California State Bar Formal Opn. No. 1981-63 in concluding that a City Council member's law firm could not represent tort litigants against the City even if the City consented.

[10/] In this opinion the Committee does not address whether the CAS lawyer's provision of other kinds of legal services, but not any appearance on behalf of lawyer's client, can create an attorney-client relationship between the CAS lawyer and Lawyer's client. (Compare *In re Brindle*, cited in the text above, to *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532, 534-535] [no attorney-client relationship found in case involving real estate exchange transaction where interests of contracting parties who retained the lawyer to prepare documents for the exchange were *adverse* to the interests of the opposing contracting parties who claimed an attorney-client relationship with lawyer].)

[11/] The situation here is distinguishable from those discussed in California State Bar Formal Ethics Opn. No. 2003-161, where the Committee concluded that a lawyer could effectively disclaim the *inadvertent* formation of an attorney-client relationship by stating that she will not or cannot represent a person seeking her services, and then not doing anything, such as providing legal advice, that would contradict that intent. California State Bar Formal Opn. No. 2003-161, at note 1 (citing to *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]); *id.* at page 6 (discussing *Gionis*.) Here, notwithstanding the CAS disclaimer concerning the formation of an attorney-client relationship, the CAS attorney has willingly provided legal services to Lawyer's client by acting in a representative capacity in appearing on behalf of Lawyer's client in court. Under such circumstances, CAS's disclaiming the formation of an attorney-client relationship is ineffective.

[12/] See California State Bar Formal Opn. No. 2003-161, Part II. Accord, Utah State Bar Ethics Advisory Opinion Committee Opn. No. 96-12 and Kansas Ethics Opn. No. 93-08.

[13/] See Rule 1-100(A).

Here, even if it were held that the CAS lawyer did not have an attorney-client relationship with Lawyer's client, the policies underlying the California Rules of Conduct would allow application of Rule 3-310(E) to a CAS lawyer who obtains confidential information regarding Lawyer's client in connection with providing services for that client. Rule 3-310(E) would preclude the CAS lawyer, without first obtaining that client's consent, from accepting the representation of a new client in matter in which the confidential information could be used or disclosed for the benefit of the new client against the wishes or interest of Lawyer's client. (See also Cal. State Bar Formal Opn. No. 2003-161, Part III.)

The Committee concluded that the reasoning of *Allen v. Academic Games League of America, Inc., supra*, 831 F.Supp. 785, and of California State Bar Formal Opn. No. 1981-63 apply equally to a CAS attorney who makes an appearance on behalf of Lawyer's client. Whether or not the CAS attorney is found to have formed an attorney-client relationship, he owes other ethical duties to Lawyer's client, including the duty to comply with conflict of interest rules, and the duties to maintain the confidence and to preserve the secrets of Lawyer's client.

2. CAS's Advertising and Soliciting For Work on Behalf of Its Lawyers

As noted above, in its advertising CAS disclaims any attorney-client relationship with Lawyer's clients, which suggests that Lawyer will be its only "client." The Committee has concluded, however, that by appearing as a lawyer on behalf of Lawyer's client, CAS lawyers assume the ethical duties of a lawyer to Lawyer's clients. To the extent that CAS's promotional materials suggest that such a relationship does not exist, they mislead attorney-recipients of the materials regarding the nature and implications of the service CAS is providing. This raises the issue of whether CAS's advertising, which is directed only to lawyers, violates any of the ethical duties of CAS lawyers.

California has both a rule, Rule 1-400, and a statute, Business and Professions Code sections 6157-6158.7, that regulate lawyer advertising. Business and Professions Code section 6106, which imposes discipline for acts involving moral turpitude, dishonesty or corruption, is also relevant to this inquiry.

Rule 1-400 (Advertising and Solicitation) states in relevant part:

> "(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:
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> * * * *
>
> (2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
>
> (3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof;
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> * * * *
>
> (D) A communication or a solicitation (as defined herein) shall not:
>
> (1) Contain any untrue statement; or
>
> (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
>
> (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public . . ."

In its promotional materials CAS advertises its lawyer's availability to make various types of appearances for a fee. Such statements are "communications" subject to rule 1-400 if they are "directed to any former, current, or

prospective client."[14/] Further, rule 1-400 is explicit that its coverage includes not just communications made by a lawyer, but also communications made on behalf of the lawyer, such as by CAS. This inclusion within the ambit of rule 1-400 of communications made on behalf of a lawyer is based on agency concepts (see *Belli v. State Bar* (1974) 10 Cal.3d 824, 837 and 840 [112 Cal.Rptr. 527]).

The Committee previously opined in California State Bar Formal Opn. No. 1981-61, however, that lawyer-to-lawyer communications do not come within the scope of the predecessor to rule 1-400 if the communications seek professional employment *through* the assistance or recommendations of the recipient attorney, or even if the communication seeks professional employment *by* the recipient attorney. The Committee reasoned that the predecessor of rule 1-400 is intended to prevent fraud, undue influence, and other abuses to which lay persons might be subject. Consequently, the rule should not apply to lawyer-to-lawyer communications because lawyers are unlikely to be affected by such vexatious conduct. Thus, to the extent the CAS advertising is directed to lawyers, it is not governed by rule 1-400.[15/]

This, however, does not end the inquiry. Since the Committee's issuance of opinion no. 1981-61, the legislature in 1993 enacted Business and Professions Code sections 6157-6157.4, which overlap rule 1-400 in also prohibiting false, misleading, and deceptive advertisements. Then in 1994 the legislature amended portions of sections 6157-6157.4 and enlarged their scope with the addition of new sections 6158-6158.7, which deal with advertising by electronic media. These sections, however, do not provide a definitive answer to whether they encompass CAS's advertising to lawyers.

On the one hand, sections 6157-6158.7, unlike rule 1-400, are not by their express language limited to communications to a "former, present, or prospective client." Thus, they arguably would apply to any false, misleading, or deceptive advertisement directed to a lawyer by CAS on behalf of CAS lawyers.

On the other hand, a review of sections 6157-6158.7 suggests that, like rule 1-400, it is intended to deal only with advertising to former, present, or prospective clients despite the absence of that limiting language in those sections. As the Committee reasoned in opinion no. 1981-61, the purpose of restrictions on lawyer advertising is to protect the public, and not to protect other lawyers who can be presumed able to protect themselves. This conclusion is reinforced by the legislative findings that accompanied the 1994 amendments and expansion of those sections. The legislature found, among other things, that: "(d) *Members of the public* may be ill-informed or unaware of their legal rights which if not timely exercised, may be lost, (e) *The public* has a need for accurate and truthful information about the availability of legal counsel, the nature of the services lawyers offer, and the prices lawyers charge for services, including routine and standardized legal services." (Sec. 1 of Stats.1994, c. 711 (A.B.3659) (emphasis added)). Given this legislative concern with the truthfulness of information provided to the public, it is possible that CAS advertisements directed to lawyers do not come within the scope of sections 6157-6158.7.[16/] Moreover, even if the CAS advertisements could be viewed as being directed to Lawyer's client, Lawyer, who

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[14/] See California State Bar Formal Opn. No. 1995-143, which distinguishes between communications and in-person or telephonic solicitations. A communication is a message made by the lawyer concerning the availability for professional employment directed to prospective clients, and can be found when a message is merely directed to potential clients regardless of whether such message is ever actually received by any potential client, for example, when transmitted by electronic media advertising.

[15/] As stated in California State Bar Formal Opn. No. 1981-61, this analysis assumes that if Lawyer delivers the CAS advertising materials to his client, he is not doing so as the agent of the CAS lawyer. That opinion also suggests that even though the predecessor of rule 1-400 does not apply to lawyer-to-lawyer advertising, abuses can be redressed. See for example, Business and Professions Code sections 6067, 6068(a), and 6106.

[16/] This opinion does not address whether and under what circumstances CAS or its lawyers may limit the scope of their engagement with Lawyer's clients to avoid assuming the duties described in this opinion. The Committee recognizes that there may be circumstances when such a limitation on the scope of the engagement is possible. Such a situation, however, is not presented in this inquiry.

makes the hiring decision, would act as a buffer and filter between CAS and the client to protect against the fraud, undue influence, and other potential abuses.[17/]

In light of the foregoing considerations, it is the Committee's opinion that sections 6157-6158.7, like rule 1-400, do not apply to lawyer-to-lawyer advertising. Nevertheless, because no court has interpreted the regulatory scope of sections 6157-6158.7, and, given the absence of rule 1-400's limiting language, lawyers should be aware that sections 6157-6158.7 might be held to apply to the CAS advertisements directed to lawyers. Accordingly, any false, misleading, or deceptive statement, such as CAS's disclaimer of any attorney-client relationship between it or CAS lawyers and Lawyer's clients, might potentially subject CAS lawyers to the civil and disciplinary consequences set out in sections 6158.4 and 6158.7.

CONCLUSION

Contract attorney services, and individual lawyers providing contract legal services to lawyers, may provide cost-effective alternatives to consumers of legal services. In using these services, those lawyers hiring the contract attorneys must comply with the ethical rules concerning the disclosure to the client of significant developments in the representation. Both those lawyers doing the hiring and those lawyers who are hired must comply with the ethical rules concerning competence, confidentiality, advertising, and conflicts of interest that apply to their respective roles in any such arrangement.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibility, or any member of the State Bar.

B. AMERICAN BAR ASSOCIATION FORMAL ETHICS OPINIONS

1. ABA Formal Ethics Opn. 03-431 (8/8/2003). *Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment.*

Summary: "A lawyer who believes that another lawyer's known violations of disciplinary rules raise substantial questions about her fitness to practice must report those violations to the appropriate professional authority. A lawyer who believes that another lawyer's mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer's consequent violation of Rule 1.16(a)(2), which requires that she withdraw from the representation of clients.

2. ABA Formal Ethics Opn. 03-432 (1/14/2004). *Lawyer Arranging or Posting Bail for a Client.*

Summary: "A lawyer may post, or arrange for the posting of, a bond to secure the release from custody of a client whom the lawyer represents in the matter with respect to which the client has been detained, but only in those rare circumstances in which there is no significant risk that her representation of the client will be materially limited by her personal interest in recovering the amount advanced."

[17/] Lawyer would, of course, have a duty to exercise due care in retaining a CAS lawyer to make an appearance on behalf of Client or subject himself to potential liability. (Rule 3-110, Discussion; *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 [177 Cal.Rptr. 670, 672]; *Gadda v. State Bar* (1990) 50 Cal.3d 344, 353-354 [267 Cal.Rptr. 114, 119.)

3. Headnote summaries of recent ABA Ethics opinions may be found at the following web site:

   http://www.abanet.org/cpr/ethicopinions.html

III. STATUTES & OTHER LEGISLATIVE DEVELOPMENTS

A. CALIFORNIA

1. AB 1101 – Confidentiality Exception to Prevent Death or Substantial Bodily Injury.

AB 1101, which was signed into law on October 12, 2003 by Governor Davis and became operative on July 1, 2004, creates a confidentiality exception to B&P Code § 6068(e) by adding section 6068(e)(2), which allows a lawyer to disclose confidential information to prevent a criminal act likely to result in death or substantial bodily harm. See Appendix for copy of AB 1101.

In addition to carving out an exception to the duty of confidentiality contained in section 6068(e), AB 1101 also amended the corresponding exception to the attorney-client privilege, Evid. Code § 956.5, to provide an exception to the privilege for any person's criminal act, not just that of the client. Here are the relevant changes to Bus. & Prof. Code § 6068(e) and Evid. Code § 956.5:

> SECTION 1. Section 6068 of the Business and Professions Code is amended to read:
>
> 6068. It is the duty of an attorney to do all of the following:
>
> * * *
>
> (e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
>
> (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
>
> * * *
>
> SEC. 2. Section 956.5 of the Evidence Code is amended to read:
>
> 956.5. There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent ~~the client from committing~~ a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

Finally, pursuant to AB 1101, the President of the State Bar, in consultation with the Supreme Court, appointed a task force to draft a rule of professional conduct to parallel the amendment to Bus. & Prof. Code §6068(e) with a goal of fleshing out "professional responsibility issues related to the implementation of this act." The Task Force, which consisted of civil and criminal law practitioners, including criminal defense practitioners, representatives from all three branches of the government, representatives of the State Bar's Rules Revision Commission and

Committee on Professional Responsibility and Conduct, and public members, promulgated new Rule of Professional Conduct 3-100. See below, for a copy of new rule 3-100.

2. **AB 2371 – "Legal Consumers Protection Act" – Amendment to Bus. & Prof. Code § 6147 (Contingent Fee Contracts) – Accurate Recording of Time in Contingency Fee Cases, Cooling-off Period Before Unsolicited Communication With Potential Claimant in Contingency Fee Matter, Etc.**

AB 2371 is currently (August 23, 2004) under reconsideration, having failed passage out of the Assembly Judiciary Committee. As initially introduced, AB 2371 would have occasioned substantial changes to Bus. & Prof. Code § 6147 (Contingent Fee Contracts), requiring, for example, accurate record keeping of hours worked even in contingent fee cases and creating a "cooling off" period of "at least 45 days after an event resulting in personal injury or death that could give rise to a cause of action by that claimant" before a lawyer could contact the prospective plaintiff. These two provisions were removed prior to the Judiciary Committee vote. The bill presented to the Judiciary Committee still contained an amendment to 6147 that would have required that lawyers provide to prospective contingent fee clients at least fives prior to the execution of the contingent fee contract a written statement in plain English that informs the client of chances of success in the case, estimated number of hours handling the claim, estimated fees, how disbursements and costs will be handled, amounts to be paid co-counsel, etc.

3. **AB 2713 – Government Whistle Blower Statute.**

Assembly Bill 2713 passed the assembly by a vote of 65 to 7 and is currently (August 23, 2004) in the Senate Judiciary Committee. If passed and signed into law, the bill will, through new Bus. & Prof. Code § 6068.1, create an exception to the duty of confidentiality contained in Bus. & Prof. Code § 6068(e) to allow government lawyers to disclose confidential information to prevent or rectify government misconduct. Proposed new section 6068.1 would provide:

6068.1. (a) If, in the course of representing a governmental organization, an attorney learns of improper governmental activity, the attorney may take one or both of the following actions:

> (1) Urge reconsideration of the matter while explaining its likely consequences to the organization.
>
> (2) Refer the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(b) (1) Notwithstanding subdivision (e) of Section 6068, the attorney may refer the matter to the law enforcement agency charged with responsibility over the matter or to any other governmental agency or official charged with overseeing or regulating the matter if the attorney meets one of the following conditions and all of the requirements described in paragraph (2) are satisfied:

(A) He or she has taken both actions described in subdivision (a) without the matter being resolved.

(B) He or she reasonably believes that taking the actions described in paragraph (1) of subdivision (a) is not reasonable under the circumstances and that taking the actions described in paragraph (2) of subdivision (a) is futile .

(C) He or she reasonably believes that the highest internal authority that can act on behalf of the organization has already, directly or indirectly, participated in the improper governmental activity.

(2) (A) The referral is warranted by the seriousness of the circumstances and is not otherwise prohibited by law.

(B) The improper governmental activity constitutes the use of the organization's official authority or influence to commit a crime or to perpetrate fraud.

(C) Further action is required in order to prevent or rectify substantial harm to the public interest or to the governmental organization resulting from the improper governmental activity.

(c) An attorney's conduct in making a referral under subdivision (b) shall not be a cause for disbarment, suspension, or other discipline if the attorney has acted reasonably and in good faith to determine the propriety of making a referral and to identify the appropriate governmental agency or official as described in subdivision (b). In addition, an attorney's conduct shall not be cause for disbarment, suspension, or other discipline if the attorney acted reasonably and in good faith in choosing to cooperate with the agency or official in the execution of the oversight or regulatory responsibilities of the agency or official regarding the referral. Once an attorney has made the referral, this subdivision shall not apply to any further affirmative conduct outside of the scope of subdivision (b) or this subdivision that is initiated by the attorney to address the improper governmental activity.

(d) An attorney may, but has no affirmative duty to, take action pursuant to this section.

(e) As used in this section, "improper governmental activity" means conduct by the governmental organization or by its agent that meets one or more of the following requirements:

(1) It constitutes the use of the organization's official authority or influence by the agent to commit a crime, fraud, or other serious and willful violation of law.

(2) It involves the agent's willful misuse of public funds, willful breach of fiduciary duty, or willful or corrupt misconduct in office.

(3) It involves the agent's willful omission to perform his or her official duty.

(f) This section shall not be construed to require that the improper governmental activity subject to its provisions be related, directly or indirectly, to the matter for which the attorney was engaged as outside counsel by the governmental organization.

Note: On September 30, 2002, Governor Davis vetoed a previous version of the bill, remarking that although the legislation "is well intentioned, it chips away at the attorney-client relationship which is intended to foster candor between an attorney and client."

4. **SB 339 – Private Child Support Collection Act.**

SB 339, if passed and signed into law, would "would limit the child support that may be collected and the fees that may be charged by a private child support collector, require that entity to provide specified notices and disclosures to the child support obligee in a written contract and during the term of the contract, authorize the obligee to cancel any contract entered into with that entity in certain circumstances, prescribe the rights of the parties with respect to local child support agencies and other governmental entities, regulate advertising by the private child support collector, and prescribe procedures and remedies for enforcement of the provisions of the act." Under the Act, a "private child support collector" includes an attorney who has contracted with a support obligee to collect the money, but would expressly "not include attorneys of record who address issues of ongoing child support or child support arrearages in the course of an action to establish parentage or a child support obligation, a proceeding under Division 10 (commencing with Section 6200), a proceeding for dissolution of marriage, legal separation, or nullity of marriage, or in post judgment or modification proceedings related to any of those actions."

B. **FEDERAL STATUTES**

1. **Sarbanes-Oxley Act of 2002.**

In 2003, we reported that the SEC rules governing conduct of attorneys who practice before the SEC and which would require attorneys to go up the ladder within the client corporation to report violations of the securities laws, and would allow lawyers to disclose to the SEC those same violations, had become effective on August 5, 2003. We also reported that it was possible that the SEC would promulgate rules requiring lawyers to make a "noisy withdrawal" if the highest authority in the corporation refused to prevent or rectify the alleged securities violations (A "noisy withdrawal" involves withdrawing from the representation and notifying the SEC that the lawyer is withdrawing for "professional considerations.") As of the date of drafting these materials, the SEC has not passed a "noisy withdrawal" provision.

IV. ETHICS RULES

A. CALIFORNIA RULES

1. State Bar of California Special Commission on the Rules of Professional Conduct

The Commission, made up of lawyer, judge and public members, is involved in a top to bottom review of the California Rules of Professional Conduct over a five-year period that commenced in fall 2001. The Commission's Charter is as follows:

"The Commission for the Revision of the Rules of Professional Conduct ("Commission") is to evaluate the existing California Rules of Professional Conduct ("California Rules") in their entirety, considering developments in the attorney professional responsibility field since the last comprehensive revision of the California Rules occurred in 1989 and 1992.

In this regard, the Commission is to consider, along with judicial and statutory developments, the Final Report and Recommendations of the American Bar Association's ("ABA") Ethics 2000 Commission and the American Law Institute's Restatement of the Law Third, The Law Governing Lawyers ("Restatement"), as well as other authorities relevant to the development of professional responsibility standards.

The Commission is specifically charged to also consider the work that has occurred at the local, state and national level with respect to Multi-Disciplinary Practice ("MDP"), Multi-Jurisdictional Practice ("MJP"), unauthorized practice of law ("UPL"), court facilitated propia persona assistance, discrete task representation and to other subjects that have a substantial impact upon the development of professional responsibility standards.

The Commission is to develop proposed amendments to the California Rules that:

1. Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;

2. Assure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992;

3. Promote confidence in the legal profession and the administration of justice; and

4. Eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues."

Meetings of the Commission, which occur about every two months, are open to the public. The Commission is posting tentative draft rule amendments to the California Bar's web site as they are completed. This is intended to allow

interested parties to monitor the Commission's work before the formal public comment period that will take place at the end of the five-year period. For more information on the Commission, please visit the home page of the State Bar at this address:

http://www.calbar.ca.gov/state/calbar/calbar_home.jsp

Click on the "Ethics" link in the right margin, then click on the Commission's link (the second link) in the left margin.

The Commission will be updating the tentative rule page regularly over the next few years.

2. **Rule of Professional Conduct to elaborate on AB 1101's Proposed Amendments to Bus. & Prof. Code § 6068(e).**

As discussed above in III.A.1, under AB 1101, a task force was appointed to study and draft a rule of professional conduct that would flesh out the statutory exception and provide guidance on how a lawyer should proceed when faced with a situation that would warrant the lawyer's disclosure of confidential information pursuant to AB 1101. The Task Force completed its work in spring 2004 and the Supreme Court adopted California Rule of Professional Conduct 3-100, slightly revised from what the Task Force had recommended. Rule 3-100 became operative on July 1, 2004. *See* **Appendix** for a copy of the rule.

B. AMERICAN BAR ASSOCIATION RULES

1. Model Rule of Court on Malpractice Insurance Coverage Disclosure

At its August 2004 Annual Meeting, the ABA's House of Delegates approved a Model Rule of Court proposed by the ABA's Client Protection Committee that requires a lawyer to certify to the governing state bar whether the lawyer currently has malpractice insurance and whether he or she intends to keep it, and which would also require that the bar make the information available to the public. The rule as approved follows.

RULE ___. INSURANCE DISCLOSURE

A. Each lawyer admitted to the active practice of law shall certify to the [highest court of the jurisdiction] on or before [December 31 of each year]: 1) whether the lawyer is engaged in the private practice of law; 2) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance; 3) whether the lawyer intends to maintain insurance during the period of time the lawyer is engaged in the private practice of law; and 4) whether the lawyer is exempt from the provisions of this Rule because the lawyer is engaged in the practice of law as a full-time government lawyer or is counsel employed by an organizational client and does not represent clients

outside that capacity. Each lawyer admitted to the active practice of law in this jurisdiction who reports being covered by professional liability insurance shall notify [the highest court in the jurisdiction] in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect or terminates for any reason.

B. The foregoing shall be certified by each lawyer admitted to the active practice of law in this jurisdiction in such form as may be prescribed by the [highest court of the jurisdiction]. The information submitted pursuant to this Rule will be made available to the public by such means as may be designated by the [highest court of the jurisdiction].

C. Any lawyer admitted to the active practice of law who fails to comply with this Rule in a timely fashion, as defined by the [highest court in the jurisdiction], may be suspended from the practice of law until such time as the lawyer complies. Supplying false information in response to this Rule shall subject the lawyer to appropriate disciplinary action.

Note that the foregoing rule is not a rule of professional conduct, but rather a proposed rule of court. Most states that have enacted a similar rule require the disclosure as part of the annual bar registration and dues payment. Accordingly, if California were to adopt a provision, it would probably not be a rule of court but would be made part of the Business & Professions Code.

V. MULTIJURISDICTIONAL PRACTICE ("MJP")

CALIFORNIA REPORT & PROPOSED RULES

1. **Introduction**. The California Supreme Court's Task Force on Multijurisdictional Practice issued its Final Report on January 7, 2002. The full report is available at the following web address:

   http://www.courtinfo.ca.gov/reference/documents/finalmjprept.pdf

   In spring 2004, after considering public comment, the Judicial Council released its final draft of the rules of court intended to allow a lawyer from another jurisdiction to practice law in California under certain conditions without either being admitted to the California Bar or being admitted pro hac vice. The final report and proposed rules, which become effective on November 15, 2004, can be found at the following web address:

   http://www.courtinfo.ca.gov/reference/documents/mjpfinalrept.pdf

2. **Summaries of Rules**. The following are brief summaries of the proposed California Rules related to MJP.

   a. ***Rule of Court 964*** would permit lawyers licensed in other jurisdictions to practice law at qualifying California"public interest" law firms (non-profits whose primary is to provide legal services without charge to the indigent) for up to three years under the supervision of a California lawyer. Registration with the State Bar (as opposed to having been admitted to the bar) would be required.

   b. ***Rule of Court 965*** would permit in-house counsel of corporations, partnerships, associations, and other legal entities with more than 10 employees, who are licensed in other jurisdictions, to provide legal services to the entity (but not appear in court on behalf of it) by registration with the State Bar.

   c. ***Rule of Court 966*** would permit out-of-state lawyers licensed in other jurisdictions to practice law in California "temporarily" if the following conditions are met (no registration required):

      - The attorney is authorized to appear in a formal legal proceeding being conducted in another jurisdiction;
      - The attorney expects to be authorized to appear in a formal legal proceeding that is anticipated but not yet pending in another jurisdiction;
      - The attorney expects to be authorized to appear in a formal legal proceeding that is anticipated but not yet pending in California; or
      - The attorney is supervised by an attorney who is authorized to appear or expects to be authorized to appear in a formal legal proceeding that is anticipated or pending.

d. ***Rule of Court 967*** would permit out-of-state lawyers licensed in other jurisdictions to provide legal services in California "temporarily" under the following circumstances (no registration required):

- To a client concerning a transaction or other nonlitigation matter, any material aspect of which is taking place in another jurisdiction in which the lawyer is licensed to practice;
- To California lawyers on an issue of federal law or the law of another jurisdiction; and
- To an employer-client or to the employer-client's subsidiaries or organizational affiliates.

The rules do not define "temporarily." It will remain for case law to determine how the time allowed to practice under proposed rules 966 and 967 should be limited, e.g., to a number of days per year, or a number of consecutive days.

The overall purpose of the rules is to "permit lawyers not admitted to the State Bar of California to practice in circumstances that (1) are clearly and narrowly defined in order to protect the general public and consumers of legal services, and (2) acknowledge and provide for the realities of legal practice today."

3. **State Bar of California MJP Regulations**. In addition to the Rules of Court, the State Bar has proposed regulations to implement the foregoing Rules of Court. The proposed regulations were published for public comment. The public comment period ended on September 7, 2004.

a. ***Proposed regulations establishing fees for registration under Rules 964 & 965.*** The State Bar proposed that the registration fees under rule 964 (legal services organization attorneys) should be $363 (for the moral character application). For rule 965 (in-house counsel), the State Bar proposed that the registration fee be $550 in addition to the $363 for the moral character application. Both legal services attorneys and in-house counsel would also be charged the same annual registration fee (bar dues) as do resident California attorneys.

b. ***Proposed regulations implementing Rules 964 & 965.*** In addition to proposing fees, the State Bar has also proposed regulations to implement the rules allowing registration of legal services attorneys and in-house counsel. The proposed legal services attorneys implementation rules for legal services attorneys may be found at the following web address:

http://calbar.ca.gov/calbar/pdfs/public-comment/2004/MJP_LegServRules.pdf

The proposed implementation rules for in-house counsel may be found at the following web address:

http://calbar.ca.gov/calbar/pdfs/public-comment/2004/MJP_InHouseRules.pdf

APPENDIX – Selected Rules of Professional Conduct

Cal. Rule 2-100. Communication With a Represented Party

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a "party" includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or

(3) Communications otherwise authorized by law.

Discussion:

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.

As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.

Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)

Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 2-200. Financial Arrangements Among Lawyers

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and

(2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.

(B) Except as permitted in paragraph (A) of this rule or rule 2-300, a member shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the member or the member's law firm by a client, or as a reward for having made a recommendation resulting in employment of the member or the member's law firm by a client. A member's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the member or the member's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

Rule 3-100. Confidential Information of a Client.

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).

(D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.

(E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

Discussion:

[1] Duty of confidentiality. Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (In Re Jordan (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., Commercial Standard Title Co. v. Superior Court (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality. The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See In the Matter

of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; Goldstein v. Lees (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.

[3] Narrow exception to duty of confidentiality under this Rule. Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section 6068(e), subdivision (1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow confidentiality exception, absent the client's informed consent, when a member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in the death of, or substantial bodily harm to an individual. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception. Although a member is not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

[4] Member not subject to discipline for revealing confidential information as permitted under this Rule. Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to an individual. A member who reveals information as permitted under this rule is not subject to discipline.

[5] No duty to reveal confidential information. Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under this rule is a matter for the individual member to decide, based on all the facts and circumstances, such as those discussed in paragraph [6] of this discussion.

[6] Deciding to reveal confidential information as permitted under paragraph (B). Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

(1) the amount of time that the member has to make a decision about disclosure;

(2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;

(3) whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;

(4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;

(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and

(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur.

[7] Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm. Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the

threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action - such as by ceasing the criminal act before harm is caused - the option for permissive disclosure by the member would cease as the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

[8] Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act. Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.

[9] Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2). A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

(1) whether the client is an experienced user of legal services;

(2) the frequency of the member's contact with the client;

(3) the nature and length of the professional relationship with the client;

(4) whether the member and client have discussed the member's duty of confidentiality or any exceptions to that duty;

(5) the likelihood that the client's matter will involve information within paragraph (B);

(6) the member's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and

(7) the member's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

[10] Avoiding a chilling effect on the lawyer-client relationship. The foregoing flexible approach to the member's informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client as

contemplated in Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.

[11] Informing client that disclosure has been made; termination of the lawyer-client relationship. When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.

[12] Other consequences of the member's disclosure. Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

[13] Other exceptions to confidentiality under California law. Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law.

Rule 3-110. Failing to Act Competently.

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Discussion:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., Waysman v. State Bar (1986) 41 Cal.3d 452; Trousil v. State Bar (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; Palomo v. State Bar (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; Crane v. State Bar (1981) 30 Cal.3d 117, 122; Black v. State Bar (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; Vaughn v. State Bar (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; Moore v. State Bar (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily

Rule 3-210. Advising the Violation of Law

A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

Discussion:

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See People v. Meredith (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See People v. Pic'l (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

Rule 3-300. Avoiding Interests Adverse to a Client

A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

Discussion:

Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 4-200.

Rule 3-300 is not intended to apply where the member and client each make an investment on terms offered to the general public or a significant portion thereof. For example, rule 3-300 is not intended to apply where A, a member, invests in a limited partnership syndicated by a third party. B, A's client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction "with" B for the purposes of the rule.

Rule 3-300 is intended to apply where the member wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 3-310. Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;

(3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subsection (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, such disclosure or consent is required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, § 962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See Woods v. Superior Court (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; Klemm v. Superior

Court (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; Ishmael v. Millington (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See San Diego Navy Federal Credit Union v. Cumis Insurance Society (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

Rule 4-100. Preserving Identity of Funds and Property of a Client

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member shall:

(1) Promptly notify a client of the receipt of the client's funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar.

(4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

(C) The Board of Governors of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

Standards:

Pursuant to rule 4-100(C) the Board of Governors of the State Bar has adopted the following standards, effective January 1, 1993, as to what "records" shall be maintained by members and law firms in accordance with subparagraph (B)(3).

(1) A member shall, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintain:

(a) a written ledger for each client on whose behalf funds are held that sets forth

(i) the name of such client,

(ii) the date, amount and source of all funds received on behalf of such client,

(iii) the date, amount, payee and purpose of each disbursement made on behalf of such client, and

(iv) the current balance for such client;

(b) a written journal for each bank account that sets forth

(i) the name of such account,

(ii) the date, amount and client affected by each debit and credit, and

(iii) the current balance in such account;

(c) all bank statements and cancelled checks for each bank account; and

(d) each monthly reconciliation (balancing) of (a), (b), and (c).

(2) A member shall, from the date of receipt of all securities and other properties held for the benefit of client through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written journal that specifies:

(a) each item of security and property held;

(b) the person on whose behalf the security or property is held;

(c) the date of receipt of the security or property;

(d) the date of distribution of the security or property; and

(e) person to whom the security or property was distributed.